No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE UNIVERSITY OF TEXAS, ET AL.,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

(1) Whether this Court should address any issues on this review of the grant of a preliminary injunction beyond deciding whether the District Court abused its discretion.

(2) Whether the Department of Health, Education and Welfare was authorized by Section 504 of the Rehabilitation Act of 1973 to require universities receiving federal aid to provide sign-language interpreters for deaf students who are qualified for the universities' programs.

(3) Whether an individual may bring a private action for injunctive relief against an institution that is allegedly denying him auxiliary aids required by § 504 of the Rehabilitation Act of 1973 and the HEW regulations issued thereunder.

(4) Whether the appeal to the Court of Appeals from the grant of a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1) was moot and should have been dismissed after the only act required by the injunction had been performed.*

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* Respondent does not believe that the third question presented by the petition—whether § 504 of the Rehabilitation Act of 1973 and the regulations thereunder require the provision of auxiliary aids if federal aid was not received for the specific program in which the handicapped student is enrolled—is properly presented to this Court, since it was not briefed, argued or decided in either court below. See pp. 12-13, *infra*.

PARTIES TO THE PROCEEDING

The parties against whom respondent Camenisch brought suit in the District Court are listed in the petition at p. ii. According to petitioner, the individuals there listed no longer serve in the official capacities in which they were in part sued. Pursuant to Fed. R. Civ. P. 25(d)(1), however, their successors are automatically substituted as defendants.

Their successors, as of this writing, are as follows:

Chancellor of the University of Texas, Dr. E. W. Walker;

Chairman of the Board of Regents of the University of Texas, none (position vacant);

President of the University of Texas at Austin, Dr. Peter Flawn;

Vice President of Administrative Services of the University of Texas at Austin, none (position abolished).

TABLE OF CONTENTS

	Page
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF FACTS	2
A. The Pleadings	2
B. Stipulated Facts and the Hearing on the Preliminary Injunction	3
C. The District Court Decision and Related Actions	5
D. The Court of Appeals Decision	6
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION	10
II. THE COURT OF APPEALS CORRECTLY CONSTRUED THE REHABILITATION ACT OF 1973 AND THIS COURT'S DECISION IN *SOUTHEASTERN COMMUNITY COLLEGE* v. *DAVIS*	13
A. Section 84.44(d) of the HEW Regulations Expressly Requires the Provision of Auxiliary Aids for Qualified Deaf Students and Exhibits an Appropriate Concern for the Costs of Compliance	15
B. Section 84.44(d) of the HEW Regulations Is Valid Because It Is Reasonably Related to the Purposes of § 504 as Shown by the Language and Legislative History of the Statute	18
1. The Original Enactment of § 504	19

TABLE OF CONTENTS—Continued

Page

2. The 1978 Amendments to the Rehabilitation Act and Their Legislative History 22

3. Conclusion 28

C. The Court of Appeals Decision Is Consistent with this Court's Decision in *Davis* and *Lau* v. *Nichols* 28

1. The *Davis* Decision 28

2. The *Lau* Decision 33

D. The Requirement that the University Provide a Classroom Interpreter Cannot Depend on the Financial Status of the Qualified Handicapped Individual 35

III. THE COURT OF APPEALS CORRECTLY HELD THAT § 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF 37

IV. RESPONDENT SUGGESTS THAT THE COURT OF APPEALS SHOULD HAVE DISMISSED THE APPEAL AS MOOT BECAUSE THE PRELIMINARY INJUNCTION WAS NO LONGER OPERATIVE 40

CONCLUSION 44

APPENDICES:

A. Sections 504 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 794 & 794a (Supp. III, 1979) 1a

B. HEW Regulation on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. pt. 84 (1979) 3a

C. HEW Analysis of Final Regulations, 45 C.F.R. pt. 84, Appendix A (1979) (excerpts) 41a

D. HEW Letter of January 24, 1980 ..... 66a

TABLE OF AUTHORITIES

Cases: Page

Adickes v. *S. H. Kress & Co.*, 398 U.S. 144 (1970).. 13
Alabama v. *United States*, 279 U.S. 229 (1929).... 10
American Bible Society v. *Blount*, 446 F.2d 588 (3d Cir. 1971) 41
Baltimore Contractors, Inc. v. *Bodinger*, 348 U.S. 176 (1955) 42
Board of Education v. *Harris*, 444 U.S. 130 (1979) 27
Bradley v. *School Board*, 416 U.S. 696 (1974) 22
Brown v. *Chote*, 411 U.S. 452 (1973) 10
California v. *Taylor*, 353 U.S. 553 (1957) 13
Camenisch v. *University of Texas*, 616 F.2d 127 (5th Cir. 1980) ..... *passim*
Canal Authority v. *Callaway*, 489 F.2d 567 (5th Cir. 1974) 5, 6, 10
Cannon v. *University of Chicago*, 441 U.S. 677 (1979) ..... *passim*
Cherry v. *Mathews*, 419 F. Supp. 922 (D.D.C. 1976) 18
Cort v. *Ash*, 422 U.S. 66 (1975) 38, 40
Davis v. *Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979) 37
Deckert v. *Independence Shares Corp.*, 311 U.S. 282 (1940) 11
DeFunis v. *Odegaard*, 416 U.S. 312 (1974) 44
Doran v. *Salem Inn, Inc.*, 422 U.S. 922 (1975) 10
Edelman v. *Jordan*, 415 U.S. 651 (1974) 11, 37
Federal Housing Administration v. *The Darlington, Inc.*, 358 U.S. 84 (1958) 25
Glidden Co. v. *Zdanok*, 370 U.S. 530 (1962) 25
Griffin v. *Breckenridge*, 403 U.S. 88 (1971) 19
Griggs v. *Duke Power Co.*, 401 U.S. 424 (1971)..... 34
Jones v. *Alfred Mayer Co.*, 392 U.S. 409 (1968).... 19
Kampmeier v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977) 38
Kinnett Dairies, Inc. v. *Farrow*, 580 F.2d 1260 (5th Cir. 1978) 43
Kling v. *Los Angeles County*, No. 80-5371 (9th Cir. Dec. 8, 1980)..... 37
Lau v. *Nichols*, 414 U.S. 563 (1974)..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964) 43
Lloyd v. *Regional Transportation Authority*, 548 F.2d 1277 (7th Cir. 1977) 35, 38
Lorillard v. *Pons*, 434 U.S. 575 (1978) 28
Maine v. *Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980) 8, 9, 12, 37
Miree v. *Dekalb County*, 433 U.S. 25 (1977) 13
Mourning v. *Family Publication Service, Inc.*, 411 U.S. 356 (1973) 18
NAACP v. *Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979) 37
National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967) 20
New York v. *Nuclear Regulatory Commission*, 550 F.2d 745 (2d Cir. 1977) 11
O'Brien v. *Fackenthal*, 284 F. 850 (6th Cir. 1922) 42
Oil Workers Union v. *Missouri*, 361 U.S. 363 (1960) 42
Quern v. *Jordan*, 440 U.S. 332 (1979) 11, 37
Regents of the University of California v. *Bakke*, 438 U.S. 265 (1978) 34, 35
Simpson v. *United States*, 435 U.S. 6 (1978) 20
Southeastern Community College v. *Davis*, 442 U.S. 397 (1979) ..... *passim*
Switzerland Cheese Association v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966) 42
Thorpe v. *Housing Authority*, 393 U.S. 268 (1969) 18
Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 (1977) 32, 33
Udall v. *Tallman*, 380 U.S. 1 (1965) 19
United Handicapped Federation v. *Andre*, 558 F. 2d 413 (8th Cir. 1977) 38
Washington Metropolitan Area Transit Authority v. *Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976) 42
Weinstein v. *Bradford*, 423 U.S. 147 (1975) 44
Western Electric Co. v. *Milgo Electronic Corp.*, 568 F.2d 1203 (5th Cir.), *cert. denied*, 439 U.S. 895 (1978) 42

TABLE OF AUTHORITIES—Continued

Statutes and Regulations: Page

Civil Rights Act of 1964:

Title VI, § 601, 42 U.S.C. § 2000d (1976) ..... *passim*
Title VII, 42 U.S.C. § 2000e *et seq.* (1976 & Supp. III, 1979) 33

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 (1976) 39
Comprehensive Employment and Training Act of 1978, § 306, 29 U.S.C. § 876 (Supp. III, 1979) .. 33
Education Amendments of 1972, tit. IX, § 901(a), 20 U.S.C. § 1681(a) (1976) 36, 38, 39
Education Amendments of 1974, § 801, 20 U.S.C. § 1221-1 (1976) 21
Education of the Handicapped Act: §§ 631-35, 20 U.S.C. §§ 1431-35 (1976) 32
Higher Education Act of 1965, *as amended*:

§ 417D, added by the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1410 (Oct. 3, 1980), to be codified at 20 U.S.C. § 1070d-1b 32
§ 441, 42 U.S.C. § 2751 (1976) 32

Rehabilitation Act of 1973, *as amended*:

§ 7(6), 29 U.S.C. § 706(7)(B) (Supp. III, 1979) 3
§§ 100-31, 29 U.S.C. §§ 720-51 (1976 & Supp. III, 1979) 32
§ 304(d), 29 U.S.C. § 774(d) (Supp. III, 1979) 23, 24
§ 305(a)(2), 29 U.S.C. § 775(a)(2) (Supp. III, 1979) 23
§ 315, 29 U.S.C. § 777e(a) (Supp. III, 1979) .. 24
§ 503, 29 U.S.C. § 793 (1976) 26
§ 504, 29 U.S.C. § 794 (Supp. III, 1979) ..... *passim*
§ 505(a)(2), 29 U.S.C. § 794(a)(2) (Supp. III, 1979) 2, 22, 39
§ 505(b), 29 U.S.C. § 794a(b) (Supp. III, 1979) 22, 39
§ 506(1), 29 U.S.C. § 794b(1) (Supp. III, 1979) 24
§ 507, 29 U.S.C. § 794c (Supp. III, 1979) 22

TABLE OF AUTHORITIES—Continued

	Page
Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (Nov. 6, 1978)	2, 22
Texas Education Code Ann. tit. 3, §§ 65.01 *et seq.*, 66.01 *et seq.*, 67.01 *et seq.* (Vernon, 1972 & 1980-81 Supp.)	37
White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, tit. III, 88 Stat. 1631-34, 29 U.S.C. § 701 note (1976)	21
28 U.S.C. § 1254(1) (1976)	1
28 U.S.C. § 1292(a)(1) (1976)	*passim*
28 U.S.C. § 1292(b) (1976)	43
42 U.S.C. § 1983 (Supp. III, 1979)	9, 12
45 C.F.R. (1979):	
§ 84.3(k)(3)	3, 29
§ 84.44(a)	30
§ 84.44(d)	*passim*
§ 84.61	38, 39
§ 84.71	38
Pt. 84, Appendix A	2, 17, 18, 29
35 Fed. Reg. 11595 (1970)	34
39 Fed. Reg. 18582 (1974)	18
41 Fed. Reg. 20312 (1976)	16
41 Fed. Reg. 20296 (1976)	16, 18
41 Fed. Reg. 29548 (1976)	16, 18
42 Fed. Reg. 22676 (1977)	15, 16
45 Fed. Reg. 30936 (1980)	2, 15
Legislative Materials:	
117 Cong. Rec. (1971):	
45945	19
45974	20
45975	20
525	20
118 Cong. Rec. (1972):	
526	19, 20
32310	19

TABLE OF AUTHORITIES—Continued

	Page
119 Cong. Rec. (1973):	
7105	20
11823	19
11824	19
24586	20
24587	20
124 Cong. Rec.:	
H3969 (daily ed. May 16, 1978)	26
H3974 (daily ed. May 16, 1978)	26
H3970 (daily ed. May 16, 1978)	23
H13471 (daily ed. Oct. 14, 1978)	25
H13472 (daily ed. Oct. 14, 1978)	25
H13473 (daily ed. Oct. 14, 1978)	24, 25
H13474 (daily ed. Oct. 14, 1978)	25
S15548 (daily ed. Sept. 20, 1978)	25
S15562 (daily ed. Sept. 20, 1978)	26
S15576 (daily ed. Sept. 20, 1978)	25, 26
S15590 (daily ed. Sept. 20, 1978)	39
S15593 (daily ed. Sept. 20, 1978)	39
S15668 (daily ed. Sept. 21, 1978)	25
H.R. 12154, 92d Cong., 1st Sess. (1971)	19
H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. (1978)	27
S. 3044, 92d Cong., 2d Sess. (1972)	19
S. Rep. No. 93-319, 93d Cong., 1st Sess. (1973)	21
S. Rep. No. 93-1139, 93d Cong., 2d Sess. (1974)	26
S. Rep. No. 93-1270, 93d Cong., 2d Sess. (1974)	36
S. Rep. No. 93-1297, 93d Cong., 2d Sess. (1974)	18, 31, 38
S. Rep. No. 95-890, 95th Cong., 2d Sess. (1978)	22, 24, 39
Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcomm. on Select Education of the House Comm. on Education and Labor, 95th Cong., 1st Sess. (1977)	27

TABLE OF AUTHORITIES—Continued

Page

Rehabilitative Extension Amendments of 1977: Hearings on S.1712 & S.1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. (1977) 27

Other Authorities:

2 K. Davis, *Administrative Law* § 7:22 (2d ed. 1979) 19

D. Finnegan, *Disabling the Disabled: Discrimination in Higher Education* (Berkeley, Cal., September 1979) 21

9 *Moore's Federal Practice* ¶ 110.25[1] (1980) 11

Note, 13 Creighton L. Rev. 607 (1979) 35

Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333 (1959) 41

Note, *The Triggering of Liability on Injunction Bonds*, 52 N.C.L. Rev. 1252 (1974) 41, 42

C. Sands, *Sutherland Statutory Construction* §§ 49.09-49.11 (4th ed. 1973) 28

Wright & Miller, 11 *Federal Practice and Procedure* (1973):

§ 2962 13

§ 2972 41

Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* § 3921 (1977) 11, 43

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BRIEF FOR RESPONDENT

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals (Pet. App. A-1) is reported at 616 F.2d 127; the judgment of that Court (Pet. App. A-24) is not reported. The memorandum opinion and order of the District Court on the preliminary injunction (Pet. App. A-18) and its judgment on that injunction (Pet. App. A-23) are not reported.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). (See Pet. Br. 2.) Respondent suggests, however, that the Court of Appeals did not have jurisdiction over the appeal from the preliminary injunction under 28 U.S.C. § 1292(a)(1), and that this Court accordingly lacks jurisdiction, because that appeal became moot when the injunction was fully satisfied. See Part IV of the Argument, pp. 40-44, *infra*.

STATUTES AND REGULATIONS INVOLVED

Sections 504 and 505 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, 92 Stat. 2982-83, and codified at 29 U.S.C. §§ 794 and 794a (Supp. III, 1979), are reproduced in Appendix A, *infra* (p. 1a).

The Regulations of the Department of Health, Education and Welfare on Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting From Federal Financial Assistance, 45 C.F.R. pt. 84 (1979), are reproduced in Appendix B, *infra* (p. 3a). The relevant parts of the Department's Analysis of Final Regulations, 45 C.F.R. pt. 84, Appendix A (1979), are reproduced in Appendix C, *infra* (p. 41a). These regulations are now under the jurisdiction of the Department of Education and have been recodified, with no change in substantive content, as 34 C.F.R. pt. 104. 45 Fed. Reg. 30936 (May 9, 1980).

STATEMENT OF FACTS

Petitioners seek review of a judgment of the Court of Appeals affirming a District Court order granting a preliminary injunction.

A. The Pleadings

Respondent Camenisch filed suit on March 1, 1978, in the United States District Court for the Western District of Texas against petitioner University of Texas and several officials thereof ("the University").[1] Camenisch, who is deaf, was at the time a graduate student at the University of Texas at Austin. The complaint (J.A. 4-7) sought a declaration that the University's refusal to provide Camenisch with a sign-language interpreter violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (1976), and the auxiliary aid regulation issued thereunder, 45 C.F.R. § 84.44(d) (1979),

[1] See Pet. at ii; see also p. ii, *supra*.

and violated the Equal Protection Clause of the Fourteenth Amendment. In addition, it sought preliminary and permanent injunctions to require the University to provide Camenisch with an interpreter at University expense "while he is a student in good standing at the defendant University." (J.A. 8; see also J.A. 16.)

The defendants filed a motion to dismiss, claiming that Camenisch was required first to exhaust administrative remedies, that there is no private right of action to enforce § 504, and that the claims against the University and against the other defendants in their official capacities were barred by the Eleventh Amendment. (J.A. 23-27.) At the same time, defendants filed an answer that denied most of the material allegations of the complaint. (J.A. 27-28.)

B. Stipulated Facts and the Hearing on the Preliminary Injunction

Immediately prior to the preliminary injunction hearing on May 11, 1978, the parties entered into a short stipulation of facts (J.A. 30-32) which provided as follows:

Camenisch is a handicapped individual within the meaning of § 7(6) of the Rehabilitation Act of 1973, 29 U.S.C. § 706(6) (1976)[2] and a qualified handicapped individual, as defined in 45 C.F.R. § 84.3(k)(3) (Stip. ¶¶ 7-8, J.A. 30).

Camenisch was employed as Dean of Students on one of the campuses of the Texas School for the Deaf, a position to which he had been appointed on an acting basis. His employment was contingent upon his taking courses to obtain a Master's Degree. Camenisch planned at the time to take at least three hours of graduate courses in the summer of 1978 at the University. (Stip. ¶ 9, J.A. 31.)

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[2] The provision has since been amended, with no substantive change applicable to Camenisch. 29 U.S.C. § 706(7)(B) (Supp. III, 1979).

Camenisch is a deaf man "who need[ed] the services of a qualified [sign-language] interpreter in order to effectively participate in the educational program operated by the defendants." (Stip. ¶ 10, J.A. 31.) Camenisch had requested the University to provide funds for an interpreter as early as the fall of 1977, but the University provided neither interpreters nor funds to pay for them. (Stip. ¶¶ 11-16, J.A. 31-32.) Camenisch had paid $1,245 for interpreter services for nine courses at the University during his graduate studies up to that time. (Stip. ¶ 16, J.A. 32.) Camenisch did not meet the established criteria for financial assistance to graduate students at the University of Texas at Austin, even when the cost of interpreters was added to his expenses for determining these criteria.[3]

The University of Texas at Austin received federal financial assistance in excess of $31,400,000 and had a budget in excess of $200 million for the year ending August 31, 1978. (Stip. ¶ 18, J.A. 32.) The University had signed an HEW Assurance of Compliance form as a condition of receiving federal financial assistance. (Stip. ¶ 17, J.A. 32; J.A. 41.)

At the hearing on the preliminary injunction (May 11, 1978, J.A. 44), Camenisch testified (through an interpreter) that he needed a sign-language interpreter for his courses at the University because

> "it is difficult for deaf people to try to read lips—or to try to lip read. And you can't tell the professor to try to face you at all times, because most of the time the professor wants to move around, tries to write on the blackboard at the same time as he is talking, and I will not be part of the class. * * * And some students may sit behind me and I am not able to read their lips because they are behind me.

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[3] The University's criteria for financial assistance to graduate students are not in the record. Camenisch's salary at the Texas School for the Deaf was approximately $1,000; he and his wife together had a combined gross income in excess of $23,000. (Stip. ¶ 9; J.A. 31.)

> Some students may ask the professor some questions and I would miss a lot." (J.A. 49-50.)

He further testified that he needed only three more hours of course work to complete his Master's Degree. (J.A. 51.)

C. The District Court Decision and Related Actions

On May 17, 1978, applying the Fifth Circuit standards for preliminary relief set forth in *Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974), the District Court ordered that a preliminary injunction issue, requiring defendants "to procure an interpreter or other effective method of making orally delivered course materials available to Plaintiff during his completion of his Master's work at Defendant University." (Pet. App. A-22.) That relief was conditioned on Camenisch posting a security bond in the amount of $3,000 "pending the outcome of this litigation." (*Id.*) The Court further ordered that the action be stayed pending a final administrative determination by HEW and that, as a condition of the preliminary injunctive relief, Camenisch initiate an administrative complaint with HEW. (*Id.*) Camenisch filed an administrative complaint with the Department of HEW on May 26, 1978. (R., Vol. I, 149-53.)

Both the District Court (May 22, 1978) and the Court of Appeals (June 28, 1978) denied defendants' applications for a stay pending appeal. (R. Vol. I, 144-48 & 179-80.) The bond required by the District Court was filed by Camenisch and approved by the Court on June 6, 1978. (J.A. 70-73.)

The University appealed from the issuance of the preliminary injunction to the United States Court of Appeals for the Fifth Circuit. See 28 U.S.C. § 1292(a)(1). In its brief on appeal, the University argued that there is no private right of action available under § 504 of the Rehabilitation Act of 1973 (pp. 2, 5-24) and that, alternatively, injunctive relief was improper prior to exhaustion of administrative remedies provided by HEW regulation (pp. 2, 24-27).

On January 24, 1980, before oral argument in the Court of Appeals, the Department of HEW issued a letter of finding on Camenisch's administrative complaint. The Department concluded that the University was "in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with impaired sensory skills, thus denying handicapped students equal educational opportunities." The Department stated that "the requested interpreter services were necessary for Camenisch to fully participate in the educational program in which he was enrolled," and that "[t]he financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided." [4]

D. The Court of Appeals Decision

On April 28, 1980, the Court of Appeals affirmed the District Court's grant of preliminary injunctive relief. (616 F.2d 127, Pet. App. A-1.) The Court noted that appellate review of a preliminary injunction was limited to an examination of whether the district court abused its discretion and approved the application of the standards for preliminary relief set out in *Canal Authority, supra.* (Pet. App. A-4.) It found that the balance of hardship weighed strongly in favor of Camenisch. (*Id.* at A-4 to A-5.) It considered the other factors—the public interest and the probability of success on the merits—in connection with an examination of the merits of Camenisch's claim. (*Id.* at A-5.)

Addressing the issue of a private right of action under § 504, the Court ruled that the issue was not moot—even though Camenisch had already received the relief he sought—because the injunction bond preserved the issue of who was liable for the cost of Camenisch's interpreter

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[4] This letter was provided to the Court of Appeals (616 F.2d 127, 130 n.3; Pet. App. A-3 n.3), but did not become part of the record. It is reproduced in Appendix D, *infra* (p. 66a).

and thus kept the controversy alive. (*Id.* at A-5 to A-6.)[5] It then declared itself in agreement with the other Courts of Appeals that have found a private right of action for injunctive relief under § 504, and it rejected the University's argument that any judicial remedy must be limited to "a post-administrative remedy judicial review." (*Id.* at A-6 to A-9.) In addition, the Court rejected the University's argument that the then-recent decision of this Court in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), barred Camenisch's claims. (*Id.* at A-11.)

Finally, the Court of Appeals ruled that the District Court had erred in conditioning the grant of preliminary injunctive relief on Camenisch's filing of an administrative complaint with HEW, stating that "private individual suits to enforce Section 504 rights can be brought without previous resort to administrative remedies." (Pet. App. A-16.)

The Court of Appeals concluded: "We therefore uphold the district court's order granting injunctive relief, but vacate that part of the order which conditioned the grant of relief on the filing of an administrative complaint with HEW. We also dissolve the stay of the action." 616 F.2d at 136.[6]

SUMMARY OF ARGUMENT

1. The University seeks review of a preliminary injunction that expired more than two years ago. It does not contend that the District Court abused its discretion in granting the preliminary injunction at that time. The

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[5] Neither party briefed any issue of mootness. The Court of Appeals itself raised the issue of possible mootness at oral argument, having established that Camenisch had received his Master's Degree, as scheduled, after his one course in the summer of 1978. While not in the record, counsel represent that Camenisch received a Master's Degree in Education on August 21, 1978.

[6] The quoted words do not appear at the end of the opinion as reprinted at Pet. App. A-17, but do appear in the reported version as cited above.

University's interest lies, instead, in having this Court establish that Camenisch cannot prevail on the merits of his lawsuit. On appeals from preliminary injunction orders, however, appellate courts do not decide threshold issues going to the merits unless there is some substantial justification for doing so. That discretionary authority to expand the scope of review should not be exercised in this case, where (a) there is no developed factual record on the extent of the financial and administrative burdens imposed by the HEW regulation requiring interpreters for qualified handicapped students; (b) the private right of action issue need not be decided in light of *Maine v. Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980); and (c) the "program specificity" issue was not briefed, argued or decided in either court below. Accordingly, under the unchallenged standards for review of preliminary injunction orders, the judgment below should be affirmed.

2. The University concedes that the applicable HEW regulation, 45 C.F.R. § 84.44(d) (1979), requires it to provide a sign-language interpreter to Camenisch, a graduate student fully qualified for the program in which he was enrolled. That regulation struck a balance between the non-discrimination mandate of § 504 of the Rehabilitation Act of 1973 and the costs of compliance by recipient institutions. It is consistent with both the language and legislative history of the original act and the legislative history of the 1978 amendments.

The University contends that this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), means that § 504 was not intended to impose *any financial obligation* on recipient institutions. *Davis*, however, acknowledged that the elimination of discrimination under § 504 might involve costs to recipient institutions. *Id.* at 411 n.10. In addition, it specifically recognized the role of HEW in identifying "those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the

handicapped." *Id.* at 413. HEW's regulatory determination that provision of interpreters is necessary to eliminate discrimination against the handicapped is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974). Hence, the regulation does not require the kind of "affirmative action" held to be unauthorized by § 504 in *Davis*.

3. Whether § 504 confers a private right of action for injunctive relief need not be resolved in this case after *Maine* v. *Thiboutot*, *supra*. That decision establishes that Camenisch had a right of action for injunctive relief against the officials of the University (a state institution) under 42 U.S.C. § 1983. In any event, the Court of Appeals decision that § 504 confers a private right of action is correct in light of *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and is consistent with the decisions of the six other federal courts of appeals that have ruled on the issue.

4. Quite apart from the merits, respondent suggests that the appeal from the preliminary injunction was moot by the time the Court of Appeals ruled. The preliminary injunction was satisfied when Camenisch completed his course requirements for a Master's Degree. The Court of Appeals ruling that the appeal was not moot because Camenisch was required to post an injunction bond is inconsistent with the prevailing rule on liability under injunction bonds and with the policies underlying 28 U.S.C. § 1292(a)(1). Liability under the injunction bond does not turn on affirmance or reversal of the preliminary injunction, but on the final outcome of the underlying lawsuit, and the fact that a plaintiff may ultimately lose the lawsuit does not prevent a preliminary injunction order from becoming moot. 28 U.S.C. § 1292(a)(1) does not authorize interlocutory appeals from expired preliminary injunctions.

ARGUMENT

I. THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN GRANTING THE PRELIMINARY INJUNCTION

As the Court of Appeals noted, appellate review of preliminary injunction orders is generally "limited to an examination of whether the district court abused its discretion." (616 F.2d at 130; Pet. App. A-4.) Similarly, this Court has held that "[i]n reviewing such interlocutory relief, this Court may only consider whether issuance of the injunction constituted an abuse of discretion." *Brown* v. *Chote*, 411 U.S. 452, 457 (1973); *accord*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *Alabama* v. *United States*, 279 U.S. 229, 230-31 (1929). Given this standard, this Court should affirm the judgment of the Court of Appeals on the ground that the District Court did not abuse its discretion in granting the preliminary injunction, and should decline to rule on the issues presented in the petition for writ of certiorari and in the University's brief.

The University has not challenged in the Court of Appeals or in this Court the propriety of the District Court's reliance on the usual four-factor analysis for considering a motion for preliminary injunction. See *Canal Authority* v. *Callaway*, 489 F.2d 567 (5th Cir. 1974).[7] Nor has it challenged the District Court's application of those factors to the facts of this case. Indeed, as the Court of Appeals concluded, the District Court correctly assessed that Camenisch had a substantial likelihood of succeeding on the merits. As for the

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[7] As the Court of Appeals below stated, those factors are as follows: (1) "Irreparable harm to the plaintiff from failure to issue the injunction"; (2) "The relative lack of harm to the defendant from issuance of the injunction"; (3) "The public interest"; and (4) "Probability that the plaintiff will ultimately succeed on the merits." (616 F.2d at 130; Pet. App. A-4.)

balance of harm between Camenisch and the University, the University has not challenged the conclusion of either court below that those factors weighed in Camenisch's favor.[8]

The University argues instead that the preliminary injunction order was erroneous because Camenisch could not have prevailed on the merits of his claim under § 504 of the Rehabilitation Act of 1973 and the pertinent regulations; and because, apart from those merits, § 504 does not confer a private right of action for injunctive relief. On appeals from preliminary injunction orders, appellate courts do, on occasion, decide such threshold issues going to the merits of the underlying claims, rather than restricting their review to whether the District Court abused its discretion in granting or denying interlocutory relief.[9] Nevertheless, some substantial justification in terms of judicial economy or fairness to the parties must be present before the appellate court thus expands the scope of review; otherwise, interlocutory appeals of insignificant injunctive orders will be encouraged and the policies of 28 U.S.C. § 1292(a)(1) defeated.[10] In this case, such substantial justifications for expanding the scope of review are absent with respect to each of the issues presented; rather, practical considerations call for limiting the scope of review here and affirming the judgment of the Court of Appeals

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[8] Apart from the reasons given by the courts below on the balance of harm, it should be noted that denial of the preliminary injunction would have effectively mooted the case entirely for Camenisch if the University is correct in its contention below (see J.A. 26) that it and its officers in their official capacities are immune under the Eleventh Amendment from retroactive monetary relief. See *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

[9] See *Deckert* v. *Independence Shares Corp.*, 311 U.S. 282, 287 (1940); Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* § 3921 at 16 *et seq.* (1977); 9 *Moore's Federal Practice* ¶ 110.25[1] (2d ed. 1980).

[10] See, *e.g.*, *New York* v. *Nuclear Regulatory Comm'n*, 550 F.2d 745, 759-62 (2d Cir. 1977).

solely on the ground that the District Court did not abuse its discretion.

As to the principal issue argued by the University—whether requiring the University to provide interpreters for qualified deaf students is consistent with this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979)—this case lacks a developed factual record on the extent of the financial and administrative burdens imposed on the University. Apart from the allegations of the complaint, the record below consists of a three-page stipulation of facts (J.A. 30-32), the brief testimony of Camenisch (J.A. 48-51), and seven documentary exhibits (J.A. 33-43 & 61-68). To the extent that the University presents arguments about an "onerous financial burden" and an administrative burden that is "not an insignificant problem" (Pet. Br. at 10), the record is inadequate to make these issues concrete.[11]

As to the second issue pressed by the University—whether § 504 confers a private right of action for injunctive relief—a determination by this Court is unnecessary because Camenisch clearly had a private right of action for injunctive relief under 42 U.S.C. § 1983 against the state university officials. *Maine* v. *Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980). Moreover, no substantial question as to § 504 is presented after the closely related decision in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and every federal court of appeals considering the issue has found such a right of action.[12]

As to the third issue the University attempts to present —whether § 504 and the applicable regulations applied to Camenisch if the specific program in which he was

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[11] Respondent concedes that the record permits a ruling on the purely legal question presented by the University—whether *any* financial obligation may be imposed by the HEW regulations for the provision of sign-language interpreters to qualified deaf students. (See Pet. Br. at 6-7.)

[12] See cases cited in note 49, *infra*.

enrolled did not receive federal financial assistance—that issue was not briefed, argued or decided in either the District Court or the Court of Appeals. As a result, there is no record at all on that issue. It is by now well-settled that this Court will not consider issues neither raised before nor considered by the District Court or the Court of Appeals. *Miree* v. *Dekalb County*, 433 U.S. 25, 33-34 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).[13]

Accordingly, this is not a case for expansion of the usual limited review of preliminary injunction orders, and the judgment of the Court of Appeals should be affirmed on the ground that the District Court did not abuse its discretion.[14] In the remainder of this brief, Camenisch principally addresses the first two issues presented by the University, insofar as the record permits.

II. THE COURT OF APPEALS CORRECTLY CONSTRUED THE REHABILITATION ACT OF 1973 AND THIS COURT'S DECISION IN *SOUTHEASTERN COMMUNITY COLLEGE* v. *DAVIS*

The University has conceded that § 84.44(d) of the HEW regulations requires an educational institution receiving federal financial assistance to accommodate a deaf student by providing and paying for a classroom interpreter. (Pet. Br. at 10.) While the University recognizes its responsibility under § 504 to make some accommo-

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[13] The University seeks a remand of the third issue (Pet. Br. at 19); but an appeal from the grant or denial of a preliminary injunction does not divest the trial court of jurisdiction or prevent the parties in any way from taking other steps in the litigation while the appeal is pending. Wright & Miller, 11 *Federal Practice and Procedure* § 2962 at 631 (1973). Thus, a remand is not necessary in order for the case to go forward on all appropriate issues.

[14] The University is fully protected by the preliminary injunction bond, should it prevail on the merits of this case after further proceedings below. See pp. 41-42, *infra*.

dations on behalf of qualified handicapped individuals—for example, allowing a deaf student like Camenisch to hire his own classroom interpreter—it considers this statutory obligation to require "no financial outlay." (*Id.* at 8.) As the University understands the law, all accommodations involving any financial expense constitute "affirmative action." (*Id.* at 8-10.) While acknowledging that such financial obligations are permissible if explicitly required by Congress, the University argues that Congress expressed no such will with respect to § 504 of the Rehabilitation Act of 1973. (*Id.* at 8.) The University relies upon this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), to support its position, construing *Davis* to hold that any HEW regulations purporting to implement § 504 in a manner which requires any expense to the recipient would be beyond the agency's lawful authority. (*Id.* at 6-10.)

The University's position hinges upon a misreading of both the Act and this Court's opinion in *Davis*. As is demonstrated below, the legislative history of the Rehabilitation Act and its 1978 amendments reveals that, in calling for accommodation to qualified handicapped persons under § 504, Congress recognized that this obligation would in some circumstances require some financial expense. In fact, Congress in 1978, with full knowledge of the HEW regulations, comprehensively reviewed and amended the Rehabilitation Act. The history of these amendments confirms that the regulation at issue here—which requires recipient institutions to provide classroom interpreters or other effective methods of making orally delivered materials available to hearing-impaired students—is consistent with § 504. Finally, the Court of Appeals correctly distinguished this case from *Davis* in ruling for Camenisch below, and that ruling is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

A. Section 84.44(d) of the HEW Regulations Expressly Requires the Provision of Auxiliary Aids for Qualified Deaf Students and Exhibits an Appropriate Concern for the Costs of Compliance

The relevant regulation, 45 C.F.R. § 84.44(d) (1979),[15] provides:

> "*Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.
>
> "(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature."

This regulation concededly requires recipients to provide either classroom interpreters or other effective methods of making orally delivered materials available to qualified deaf students such as Camenisch.[16]

Section 84.44(d) is a product of an exhaustive and careful rulemaking process which spanned two Adminis-

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[15] As noted at p. 2, *supra*, this regulation has now been recodified, with no change in substantive content, as part of 34 C.F.R. pt. 104. 45 Fed. Reg. 30936 (May 9, 1980).

[16] As Secretary Califano stated in the preamble to the final regulations, one is not "providing equal educational opportunity to a deaf child by admitting him or her to a classroom but providing no means for the child to understand the teacher or receive instruction." 42 Fed. Reg. 22676 (1976).

trations.[17] The history of this rulemaking process reveals that HEW explicitly considered the financial concerns of colleges and universities in formulating the final regulations. For example, Secretary Califano stated in the preamble to the final regulations "that factors of burden and cost had to be taken into account in the regulation in prescribing the actions necessary to end discrimination and to bring handicapped persons into full participation in federally financed programs and activities." 42 Fed. Reg. 22676 (1977).[18]

Indeed, § 84.44(d) places limits on the scope of a university's obligation to provide auxiliary aids to qualified deaf students and represents a careful balance between the non-discrimination mandates of § 504 and the concerns of recipient universities about the costs of compliance. First, the language of the regulation requires universities to provide classroom interpreters or other effective methods of communication only when "necessary to ensure" equal participation and non-discrimination. This limitation recognizes that, depending on their personal skills and particular course of study, not all deaf students

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[17] HEW published a Notice of Intent to Issue Proposed Rules on May 17, 1976, seeking public comment on the draft proposed rules which were attached to the Notice. 41 Fed. Reg. 20296 (1976). Over 300 written comments were received in response to this Notice, and these were supplemented by a series of ten meetings conducted by HEW at various locations across the country. See 42 Fed. Reg. 22676 (1977). On July 16, 1976, the Department published a Notice of Proposed Rulemaking, analyzing the comments received and setting forth revised proposed regulations for further public comment. 41 Fed. Reg. 29548 (1976). Approximately 850 comments were received, and an additional 22 public meetings were held after publication of this July 16 Notice. See 42 Fed. Reg. 22676 (1977). All of this information was considered and analyzed prior to the promulgation of the final rules and regulations on May 4, 1977. *Id.* at 22676-77.

[18] When the regulations were proposed, HEW published a study conducted for the Department that concluded: "It is not expected that subpart E [which includes § 84.44(d)] . . . will impose significant additional costs" on institutions of higher education. 41 Fed. Reg. 20312, 20360 (1976).

will require auxiliary aids. Some deaf individuals are excellent lipreaders and have understandable speech. Even for those students whose primary mode of communication is sign-language, the course of study—for example, laboratory work or independent study—may not necessitate the use of interpreters. Second, § 84.44(d) affords recipients flexibility in choosing the type of auxiliary aids when such aids are required. Thus, in certain situations, provision of class notes or transcripts of lectures or no auxiliary aid at all will fulfill the regulatory requirement. Finally, the regulation expressly limits the provision of auxiliary aids to classroom or class-related activities by providing that "[r]ecipients need *not* provide attendants, individually prescribed devices, readers for *personal* use or study, or other devices or services of a *personal* nature." (Emphasis added.)

This careful balancing is further illustrated by the HEW Analysis of Final Regulations for § 84.44(d). (45 C.F.R. pt. 84, App. A at 377 (1979); p. 41a, *infra*.) This Analysis emphasizes that even when an interpreter is necessary to enable a deaf student to participate effectively in class, "recipients can usually meet this [auxiliary aid] obligation by assisting students in using existing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges and universities."[19] (*Id.* at 392; pp. 62a-63a, *infra*.) Thus, although universities bear the ultimate responsibility for proving auxiliary aids to qualified deaf students when necessary, HEW took account of the availability of money from other sources in outlining the scope of the universities' obligation.[20]

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[19] The variety of funding sources for auxiliary aids is explored more fully at note 39, *infra*.

[20] In the event that outside funding sources cannot be located, the HEW Analysis provides that "the institution has flexibility in choosing the methods by which the aids will be supplied. For ex-

B. Section 84.44(d) of the HEW Regulations Is Valid Because It Is Reasonably Related to the Purposes of § 504 as Shown by the Language and Legislative History of the Statute

While the University concedes that § 84.44(d) requires the result sought by Camenisch, it contends that the regulation exceeds the authority conferred by § 504.

It is a well-established rule that the validity of a regulation will be sustained if the regulation is "reasonably related to the purposes of the enabling legislation." *Thorpe* v. *Housing Authority*, 393 U.S. 268, 280-81 (1969); *accord, Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973).[21] Both the language of § 504 and its legislative history show that the auxiliary aid requirement of § 84.44(d) is reasonably related to the purposes of the statute.[22]

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ample, some universities have used students to work with the institution's handicapped students." (45 C.F.R. pt. 84, App. A at 392 (1979); p. 63a, *infra*).

[21] The *Thorpe* rule applies when a regulation has been promulgated pursuant to proper rulemaking authority. The University does not contest HEW's authority to promulgate substantive regulations under § 504, and such rulemaking authority was conferred with the enactment of the statute. *Cherry* v. *Mathews*, 419 F. Supp. 922, 924 (D.D.C. 1976); see S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974). This rulemaking authority is recognized by the Court in *Southeastern Community College* v. *Davis*, 442 U.S. at 413.

[22] In *Southeastern Community College* v. *Davis*, 442 U.S. at 411-12 n.11, the Court suggested that the HEW regulations under § 504 are to be accorded diminished deference because they were promulgated only after HEW was enjoined to do so in *Cherry* v. *Mathews*, 419 F. Supp. 922 (D.D.C. 1976). This statement appears to be based on an erroneous factual premise. First, as early as May 1974, HEW recognized its responsibility to develop § 504 regulations. 39 Fed. Reg. 18582 (1974). Second, the HEW regulatory process was in fact well under way before the injunction order in *Cherry*. Both draft regulations, 41 Fed. Reg. 20296 (1976), and proposed regulations, 41 Fed. Reg. 29548 (1976), had been published before the Cherry decision issued on July 19, 1976. Further, HEW maintained in *Cherry* that it had authority to issue regulations, and the only dispute was how soon HEW would issue the

1. *The Original Enactment of § 504*

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. III, 1979), provides, in pertinent part:

> "No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." [23]

The language and brief legislative history of the original enactment of § 504 in 1973 establish that § 504 is a civil rights statute, the primary purpose of which is to eliminate discrimination against qualified handicapped persons and increase their opportunities to participate in and benefit from federally funded programs.[24] Of particular relevance to the present case, Congress focused on equal educational opportunities for qualified handicapped

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final regulations. Memo. in Opposition to Plaintiffs' Motion for Summ. Judgment & in Support of Defendants' Cross Motion for Judgment at 2 (May 10, 1976). In light of these facts, the regulation at issue should be afforded the full deference usually given the interpretation of a statute by the agency charged with its administration. See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); 2 K. Davis, *Administrative Law* § 7:22 at 105-08 (2d ed. 1979).

[23] The quoted words have not changed since the original enactment of the statute, although language was added by the 1978 Amendments which expressly extended coverage of the statute to the federal government. See p. 23, *infra*.

[24] Section 504 was initially proposed by Congressman Vanik and Senator Humphrey as an amendment to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. See H.R. 12154, 92d Cong., 1st Sess. (1971), 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess. (1972), 118 Cong. Rec. 526 (1972). Sen. Humphrey stated that the final version of § 504 as part of the Rehabilitation Act did "carry through the intent of original bills." 118 Cong. Rec. 32310 (1972). See also 119 Cong. Rec. 11823-24 (1973) (remarks of Rep. Vanik). As a civil rights statute, § 504 should be interpreted in a manner that accords as broad a sweep as its language permits. See *Griffin* v. *Breckenridge*, 403 U.S. 88, 98 (1971); *Jones* v. *Alfred Mayer Co.*, 392 U.S. 409, 437 (1968).

individuals and intended that recipients of federal financial assistance accommodate the needs of such individuals even where expense would be involved.

Senator Percy, one of the original Senate sponsors, stated that the purpose of the statute was to realize the commitment "to eliminate the glaring neglect of our handicapped citizens," and "*guarantee*[] *the handicapped equal opportunity to education* . . . ." 118 Cong. Rec. 526 (1972) (emphasis added). Similarly, Representative Vanik, the chief sponsor of the predecessor of § 504 in the House of Representatives, explained the purpose of the statute as follows:

> "*Education* and vocation training is perhaps the great equalizer of employment opportunity in that it provides the individual with the most basic tools of any trade. *Education of the handicapped is one of the most cost-effective endeavors* the American educational enterprise has ever undertaken.
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> . . . .
>
> "There is a vital message in the decision for those in America who wish to protect the *civil rights* of the handicapped. *Not only is exclusion from educational services a discriminatory practice, but it is a violation of due process rights.*
>
> . . . .
>
> "My proposed legislation will ensure *equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities.*"

117 Cong. Rec. 45974-75 (1971) (emphasis added).[25] See also 119 Cong. Rec. 7105 (remarks of Rep. Peyser), 24586-87 (remarks of Sen. Randolph) (1973); 118 Cong. Rec. 525 (1972) (remarks of Sen. Humphrey).

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[25] This Court has often noted that the statements of the legislative sponsors deserve substantial weight in interpreting a statute. *Simpson* v. *United States*, 435 U.S. 6, 13 (1978); *National Woodwork Manufacturers Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967).

The emphasis on ensuring equal educational opportunities for handicapped individuals is inescapable in the legislative history of § 504.[26] And Representative Vanik's comments concerning the cost-effectiveness of providing these equal educational opportunities reflects a recognition that elimination of discrimination in the educational area would involve some costs. The enactment of § 504 indicates that Congress felt these costs to be outweighed by the benefits.[27] Accordingly, the provision of classroom interpreters for qualified deaf students—as required by § 84.44(d)—falls within the costs that Congress deemed necessary to ensure equal educational opportunities for these students.

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[26] On the same day that the Senate Committee issued its report on the Rehabilitation Act of 1973, it issued a report on the White House Conference on Handicapped Individuals Act, Pub. L. No. 93-561, tit. III, 88 Stat. 1631-34, 29 U.S.C. § 701 note (1976). The Committee expressed its commitment to solving "the real needs of handicapped who are young adults, or adults, and have been excluded from school in the past, or desire continuing adult and higher education or retraining in a particular skill. The Committee is aware that at the present time most of these avenues are not open to the handicapped, and would like to see this situation changed." S. Rep. No. 93-319, 93d Cong., 1st Sess. 8 (1973). Similarly, § 801 of the Education Amendments of 1974, 20 U.S.C. § 1221-1 (1976), states: "Recognizing that the Nation's economic, political, and social security require a well-educated citizenry, the Congress (1) reaffirms, as a matter of high priority, the Nation's goal of equal educational opportunity, and (2) declares it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential *without financial barriers*." (Emphasis added.)

[27] Studies show that investment in college education for the handicapped reduces welfare costs, expands the tax base, and increases productivity. If disabled people were as well-educated as the general populace, it has been estimated that "yearly governmental savings, in the form of reduced welfare costs and increased tax income, [would be] between 10 and 15 billion dollars." D. Finnegan, *Disabling the Disabled: Discrimination in Higher Education* 19 n.14 (Berkeley, Cal., September 1979).

2. *The 1978 Amendments to the Rehabilitation Act and Their Legislative History*

In 1978, Congress extensively amended the Rehabilitation Act of 1973.[28] In the course of considering these amendments, Congress comprehensively reviewed both the Act as a whole and the HEW regulations promulgated thereunder. We show below that Congress paid careful attention to § 504 and, more specifically, to the needs of deaf persons in enacting several amendments directly related to the requirements of § 504. These amendments and their legislative history confirm that § 84.44(d) is consistent with § 504.[29]

Several of the significant amendments enacted in 1978 facilitate enforcement and broaden the coverage of § 504. A new § 505(a)(2) was added to the Act; it provides:

> "The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d *et seq.*] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this title." 29 U.S.C. § 794a(a)(2) (Supp. III, 1979)

An attorney's fees provision, § 505(b), 29 U.S.C. § 794a(b) (Supp. III, 1979), was added to "assist in vindicating private rights of action . . . under . . . 504." S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978). A new § 507, 29 U.S.C. § 794c (Supp. III, 1979), was added to create an

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[28] Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978, Pub. L. No. 95-602, 92 Stat. 2955 (Nov. 6, 1978) (hereinafter referred to as the "1978 Amendments").

[29] These amendments, enacted eight months after Camenisch filed his complaint against the University, must be taken into account in passing on the validity of the HEW regulation at issue. To do otherwise would be inconsistent with the well-established rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley* v. *School Board*, 416 U.S. 696, 711 (1974).

Interagency Coordinating Council to promote the "implementation and enforcement of the provisions of [Title V], and the regulations prescribed thereunder." Finally, Congress appended language to § 504 itself, extending its coverage to programs and activities operated by the federal government.[30]

Several other provisions added to the Rehabilitation Act by the 1978 Amendments reflect a Congressional intent to confront the unique problems of deaf persons, and to assist recipients in meeting the recognized auxiliary aid obligations under § 504 and the relevant HEW regulation. For instance, new § 305(a)(2), 29 U.S.C. § 775(a)(2) (Supp. III, 1979), authorizes grants to states for the establishment of comprehensive rehabilitation centers that "shall provide . . . to local governmental units and other public and private nonprofit entities located in the area such information and technical assistance (*including support personnel such as interpreters for the deaf*) as may be necessary to assist those entities in complying with this [Act], *particularly the requirements of section* [*504*]."[31] (Emphasis added.)

Along these same lines, new § 304(d), 29 U.S.C. § 774(d) (Supp. III, 1979), authorizes grants to public and private nonprofit institutions to establish 12 programs

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[30] Congress added this language to overrule a Justice Department interpretation that § 504 only applied to recipients of federal financial assistance, and not to the federal government itself. See 124 Cong. Rec. H3970 (daily ed. May 16, 1978) (remarks of Rep. Jeffords). Footnote 11 of the *Davis* decision took note of the fact that the amendment to § 504 specifically authorized regulations to implement only that amendment, and added: "The fact that no other regulations were mentioned supports an inference that no others were approved." 442 U.S. at 412 n. 11. But there was no issue in 1978 about the authority of HEW to issue regulations implementing § 504. See notes 21 & 22, *supra*. Accordingly, there was no need to mention that authority in amending § 504.

[31] This Court in *Davis* noted that § 305(a)(2) "recognizes that on occasion the elimination of discrimination might involve some costs . . . ." 42 U.S. at 411 n.10.

"[f]or the purpose of training a sufficient number of interpreters to meet the communication needs of deaf individuals." The Senate Committee Report explains that § 304(d) was enacted partially "in response to the requirements imposed by section 504 . . . ." S. Rep. No. 95-890, 95th Cong., 2d Sess. 41 (1978). In the House floor debate immediately preceding the vote on the 1978 Amendments, Representative Jeffords—a sponsor, minority floor manager, and conferee on the bill—elaborated on the purpose of § 304(d) as follows: "The provision in this conference report will establish 12 interpreter-training centers and interpreter pools within each State and help to alleviate these problems and *make section 504's nondiscrimination policies meaningful* as well as applicable to them." 124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978) (emphasis added).[32]

This Congressional understanding that implementation of § 504 required an availability of qualified interpreters to aid deaf persons is confirmed by the House and Senate floor debates immediately preceding the votes on the 1978 Amendments. Representative Jeffords' comments are typical:

> "As a result of Section 504, it has become clear to many that *504 means more than just removing architectural barriers for the physically handicapped.* While this is certainly a priority goal, there are many other types of disabilities to which 504 applies and to which attention must be paid. *People who are deaf*

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[32] Another 1978 amendment added § 315 to the Act, 29 U.S.C. § 777e(a) (Supp. III, 1979), which authorizes grants to "establish within each state a program of interpreter services (including interpreter referral services) which shall be made available to deaf individuals and to any public agency or private nonprofit organization involved in the delivery of assistance or services to deaf individuals." And a new § 506(1), 29 U.S.C. § 794b(1) (Supp. III, 1979), was added to provide for technical assistance to any public or nonprofit agency, institution, or organization "for the purpose of assisting such persons or entities in removing architectural, transportation, or *communication* barriers." (Emphasis added.)

> *face communication barriers which are just as great as the architectural barriers faced by those in wheelchairs.*"

124 Cong. Rec. H13473 (daily ed. Oct. 14, 1978) (emphasis added); see *id.* at H13471 & H13472 (remarks of Rep. Brademas, the bill's sponsor and majority floor leader). On the Senate floor, similar statements in support of these amendments were made. *E.g.*, 124 Cong. Rec. S15668 (daily ed. Sept. 21, 1978) (remarks of Sen. Hatch, a bill sponsor); *id.* at S15548 (remarks of Sen. Randolph, a bill sponsor), S15562 (remarks of Sen. Williams, chairman of the committee reporting out the bill), and S15576 (remarks of Sen. Javits, a bill sponsor) (daily ed. Sept. 20, 1978).

The above programs were thus clearly intended to help institutions meet what Congress understood were their obligations under § 504 to provide interpreters for deaf people. Representative Jeffords made clear, however, that the existence of federal funds to help implement § 504 would not relieve recipients of their responsibilities to comply with its requirements: "I must emphasize so that there is no misunderstanding that my insistence that the Federal Government pay part of the costs is in no way to negate or minimize the removal of barriers for the handicapped, or in any way to halt or delay action until the Federal Government puts up some money." 124 Cong. Rec. H13474 (daily ed. Oct. 14, 1978).[33]

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[33] See also § 306(a) of the Comprehensive Employment and Training Act of 1978, 29 U.S.C. § 876(a) (Supp. III, 1979), in which Congress found and declared that "due to the rapid implementation at programs to assist handicapped individuals *mandated under . . . section 504 . . .* there is a need for people to provide the *special supportive services . . . required by these Acts.*" Section 306(b), 29 U.S.C. § 876(b), provides for the establishment of programs to train personnel to assist the handicapped, specifically including "interpreters for the deaf and aides in classrooms." Subsequently enacted legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 541 (1962); *Federal Housing Admin.* v. *The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

In these same floor debates, several Congressmen voiced their specific approval of HEW's regulations under § 504. Senator Williams, a sponsor of the bill and Chairman of the Committee reporting the bill, remarked:

> "With the signing of the regulations implementing section 504 of the Rehabilitation Act of 1973 by the Secretary of Health, Education, and Welfare, this administration has assured prohibitions on discrimination for persons with disabilities by anyone receiving Federal funds."

124 Cong. Rec. S15562 (daily ed. Sept. 20, 1978); see *id.* at S15567. Senator Javits, another of the bill's sponsors, in introducing an amendment on reader services, stated that "there is a great demand for such services, largely generated through the landmark Title V provisions of the Rehabilitation Act, which have now been put into effect under regulations of HEW." *Id.* at S15576. During the House floor debates, Representative Dodd declared that he "strongly supported the long-delayed issuance of the section 504 regulations, believing then, as now, that the protection they establish for the handicapped are very much needed." 124 Cong. Rec. H3974 (daily ed. May 16, 1978). Finally, Representative Jeffords also commented on the significance of the HEW regulations: "As a result of the regulations, *recipients of Federal dollars now had to do something* to make it possible for disabled people to be involved." *Id.* at H3969 (emphasis added).[34]

These expressions of approval of HEW's regulations are even more pertinent when viewed in light of the fact

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[34] It is significant that no expressions of disapproval were directed toward the HEW regulations here at issue. In 1974, Congress was not timid in expressing its disapproval of the Department of Labor's interim regulations under § 503 of the Act, 29 U.S.C. § 793 (1976). The Senate Report on the 1974 Amendments noted the Committee's "great disappointment with the Department of Labor's 'interim' regulations," and went on to state that it "hopes and expects that the Department will take the occasion to review and revise its regulations . . . ." S. Rep. No. 93-1139, 93d Cong., 2d Sess. 25-26 (1974).

that both houses of Congress considered the regulations in hearings just one year before these floor debates. The House Subcommittee on Select Education met in September 1977 "for the purpose of oversight hearings on [HEW] regulations issued earlier this year to implement Section 504 of the Rehabilitation Act of 1973, prohibiting discrimination against handicapped persons in federally assisted programs." *Implementation of Section 504, Rehabilitation Act of 1973: Hearings Before the House Subcomm. on Select Education of the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 1 (1977) (opening statement of Rep. Brademas, chairman of the subcommittee). Each member of the Senate and the House previously had been provided with a copy of the HEW regulations to review at the time the regulations were issued. *Id.* at 73, 76. Representative Brademas stated at the outset of the House hearings:

> "With the publication of the regulations for Section 504, disabled people look forward to their rightful opportunity for full participation in our society. Central to the implementation of these regulations must be the realization that *what handicapped people want is access to programs. Inevitably, enforcement of and compliance with Section 504 will cause some readjustment problems. Costs may be incurred and modifications might be required.*"

Id. at 1 (emphasis added).[35]

All of this legislative history behind these substantial amendments of the Rehabilitation Act in 1978 compels

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[35] The testimony of the House implementation hearings was specifically noted in the House Report on the 1978 Amendments. H.R. Rep. No. 95-1149, 95th Cong., 2d Sess. 34 (1978). For the Senate hearings in 1977, see *Rehabilitative Extension Amendments of 1977: Hearings on S.1712 & S.1596 Before the Subcomm. on the Handicapped of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 220, 480-81, 554-55, 726-27 (1977). For an example of the significance of Congressional awareness of HEW regulations prior to comprehensive revision of a statute, see *Board of Education* v. *Harris*, 444 U.S. 130, 149 (1979).

the conclusion that the § 84.44(d) auxiliary aid requirement of the HEW regulations is well within the scope of § 504, at least insofar as it commands recipient universities to provide and pay for interpreters for otherwise qualified deaf students.[36]

3. *Conclusion*

That the regulation at issue is "reasonably related" to the purposes of § 504—and is thus valid—is evident from both the language of the statute and its legislative history. Indeed, the provision of classroom interpreters for qualified deaf individuals is necessary to implement § 504 in the educational context, as HEW properly ruled by regulation. Although it was anticipated that the federal government at times would alleviate the costs of the necessary accommodations, Congress placed ultimate responsibility on the recipients of federal financial assistance. Section 84.44(d) effectuates the will of Congress, and its validity is beyond question in this case insofar as it was held to require the University to provide Camenisch with a classroom interpreter.

C. The Court of Appeals Decision Is Consistent with this Court's Decisions in *Davis* and *Lau* v. *Nichols*

1. *The* Davis *Decision*

The University relies upon this Court's decision in *Southeastern Community College* v. *Davis*, 442 U.S. 397 (1979), to support its position that § 504 was not intended to impose *any* financial obligations on recipient institutions. (Pet. Br. at 5-8). Accordingly, it asserts that any HEW regulations purporting to implement § 504 in a manner which requires *any* expense would constitute "affirmative action," and thus exceed the agency's lawful authority. (*Id.* at 6-10.) As the Court of Appeals cor-

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[36] When Congress comprehensively reviews and amends a statute, the legislative history of the amendments is to be accorded substantial weight in interpreting that statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-81 (1978); 2A C. Sands, *Sutherland Statutory Construction* §§ 49.09-49.11 (4th ed. 1973).

rectly decided in ruling for Camenisch, however, the *Davis* decision does not support the University's argument.

In *Davis*, a hearing-impaired woman was denied admission to the Associate Degree Nursing Program at Southeastern Community College because the college concluded that her handicap "could interfere with her safely caring for patients." 442 U.S. at 402. The Court held that she was not an "otherwise qualified person" within the meaning of the statute because she could not meet the college's "legitimate physical requirements." *Id.* at 406-07. The college's physical requirements were found to be legitimate because the ability to understand speech without reliance on lipreading was "necessary for patient safety during the clinical phase of the program" and "indispensable for many of the functions that a registered nurse performs." *Id.* at 407. Finally, the HEW regulations did not—and could not, in light of the purpose of § 504—require the University to make the "fundamental alteration in the nature of [the nursing] program" that would have been required to accommodate Davis. *Id.* at 410.

The distinctions between *Davis* and the present case are evident: Most important, it was stipulated below that Camenisch was a "qualified handicapped person" as defined by 45 C.F.R. § 84.3(k)(3) (1979). That is, he met "the academic and technical standards requisite to admission or participation in the recipient's education program or activity." *Id.*[37] In short, the University here has stipulated away the very issue that was at the heart of the *Davis* case.

To highlight this distinction, the ability to understand speech without lipreading was a necessary part of the clinical phase of the nursing program to which Davis

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[37] The Analysis accompanying the regulation makes clear that this definition is intended to be interchangeable with the statutory term "otherwise qualified handicapped person." (45 C.F.R. pt. 84, App. A at 379 (1979); pp. 48a-49a, *infra*.) Indeed, this Court quoted extensively from the regulatory definition and Analysis in *Davis* to support its holding. 442 U.S. at 406-07.

sought admission; but there is no contention in this case that the ability to understand oral communication without the assistance of an interpreter was a necessary or even important part of the Master's Degree program in which Camenisch was enrolled. Similarly, Davis's handicap prevented her from performing "many of the functions that a registered nurse performs" (442 U.S. at 407); but there is no contention that Camenisch's handicap would have prevented him from performing many of the functions of an individual with his Master's Degree.

In addition, the accommodations sought by Davis included "individual supervision by faculty members whenever she attends patients directly" and waiver of certain required courses. *Id.* at 407-08. Camenisch, on the other hand, did not seek any modification of the curriculum, any lowering of standards, or any individual attention from faculty members. Accordingly, while the Court in *Davis* stated that the applicable HEW regulations might not be valid if they required "the extensive modifications necessary to include [Davis] in the nursing program" (*id.* at 410), no such question arises in this case.

Finally, the Court in *Davis* found it to be reasonably clear that the applicable HEW regulations, 45 C.F.R. §§ 84.44(a) & 84.44(d) (1979), did *not* require the kind of modifications that would have benefited Davis. The University conceded in this case, however, that § 84.44 (d) does require an interpreter for qualified deaf students like Camenisch.

While *Davis* is distinguishable on all of the above grounds, the University points to specific language in that opinion as supporting its position. The Court stated that § 504 reflects "a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons and affirmative efforts to overcome the disabilities caused by handicaps." 442 U.S. at 410. It concluded from this distinction that "neither the language, purpose, nor history of § 504 reveals an

intent to impose an affirmative action obligation on all recipients of federal funds." *Id.* at 411. Furthermore, the Court stated that the HEW regulations "would constitute an unauthorized extension of the obligations imposed by [§ 504]" if they "were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals." *Id.* at 410. No part of this analysis is inconsistent with the result reached below.

The Court in *Davis* pointedly stated that "[w]e do not suggest that the line between a lawful refusal to extend affirmative action and illegal discrimination against handicapped persons always will be clear." *Id.* at 412. It specifically recognized the role of HEW in drawing this line by saying: "Identification of those instances where a refusal to accommodate the needs of a disabled person amounts to discrimination against the handicapped continues to be an important responsibility of HEW." *Id.* at 413.[38] In the present case, it is conceded that § 84.44(d) required the University to provide an interpreter for Camenisch, and HEW has made a specific finding on Camenisch's administrative complaint that the University's failure to provide a sign-language interpreter constituted illegal discrimination in violation of § 504. (See p. 66a, *infra.*)

The provision of a classroom interpreter under § 84.44 (d) may entail expenditures of money by a university, but as the Court in *Davis* noted, "on occasion the elimination of discrimination [under § 504] might involve some costs . . . ." 442 U.S. at 411 n.10. As has been shown above, this recognition fully comports with the legislative history of the original Act and the 1978 Amendments. Thus, there is no support in *Davis* for

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[38] In discussing HEW's rulemaking obligations under § 504, the Senate Report on the 1974 amendments to the Act recognized HEW's "experience in dealing with handicapped persons and with the elimination of discrimination in other areas . . . ." S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

the University's argument that no financial outlay may be required under § 504. Such a reading of § 504 would render that statute of little value to the handicapped individuals it was designed to protect. As the language and legislative history of § 504 clearly show, Congress intended far more than such a hollow promise.

By contrast with the relief sought in *Davis*, § 84.44 (d) as applied here does not require any "substantial adjustments in existing programs." *Id.* at 410. (See pp. 29-30, *supra.*) Furthermore, there is no evidence in the record that the costs necessary to accommodate Camenisch and others like him need impose an "undue" financial burden on the University. See 442 U.S. at 412.[39]

Accordingly, the requirement of an interpreter for Camenisch is not "affirmative action" of a kind inconsistent with § 504. Rather, it is a reasonable requirement aimed at the elimination of discrimination against qualified handicapped individuals.[40] HEW's regulatory

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[39] A variety of outside funding sources are available to aid universities in providing classroom interpreters for otherwise qualified deaf students. While not pretending to be exhaustive, a list of such sources includes: (1) Vocational Rehabilitation (VR) agencies under Title I of the Rehabilitation Act of 1973, 29 U.S.C. §§ 720-51 (1976 & Supp. III, 1979), which requires state VR agencies to provide 11 basic vocational services, including interpreters for deaf individuals; (2) college work-study programs under § 441 of the Higher Education Act of 1965, as amended, 42 U.S.C. § 2751 (1976), the money of which can be used to pay nonhandicapped students to serve as interpreters, readers or notetakers; (3) funds to pay the costs of training personnel for handicapped children under §§ 631-35 of the Education of the Handicapped Act, 20 U.S.C. §§ 1431-35 (1976); and (4) funds for "special services for disadvantaged students," including the "physically handicapped" under § 417D of the Higher Education Act of 1965, as amended by the Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1410 (Oct. 3, 1980), to be codified in 20 U.S.C. § 1070d-1b. The first three sources of alternate funding were available to the University when Camenisch requested an interpreter.

[40] The case of *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), is readily distinguishable. There, the Court held that a private employer need bear no more than a *de minimus* cost to

determination that interpreters are necessary to eliminate discrimination against the handicapped is directly supported by this Court's decision in *Lau* v. *Nichols*, 414 U.S. 563 (1974).

2. *The* Lau *Decision*

In *Lau*, the Court construed § 601 of the Civil Rights Act of 1964 [41]—a provision that § 504 closely tracks and was patterned after. (See note 45, *infra*.) Non-English-speaking Chinese students brought suit against officials of the San Francisco Unified School District, seeking relief against the unequal educational opportunities caused by the school district's failure to remedy their language barrier. *Id.* at 564. These unequal educational opportunities were alleged to violate § 601 and the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 564-65. No specific remedy was urged. *Id.* at 564.

A unanimous Court held for the students, relying solely on § 601 and not reaching the Equal Protection Clause argument advanced. *Id.* at 566. Discrimination was found because "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education." *Id.* The Court elaborated that "those

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accommodate an employee's religious preference under Title VII of the Civil Rights Act of 1964. *Id.* at 84-85. The Court stressed that to require the employer to bear additional costs in such accommodation would involve discriminatory unequal treatment of other employees on the basis of religion. *Id. Hardison* thus has no relevance to the present case. No First Amendment Freedoms are concerned here, and there is no assertion that providing Camenisch with an interpreter would have resulted in discrimination against anyone else.

[41] Section 601, 42 U.S.C. § 2000d (1976), provides: "No person of the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

who do not understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful." *Id.* Having found such discrimination, the Court held that § 601 required the school district to undertake affirmative remedial efforts to rectify the language deficiency. *Id.* at 567-69, 570-71 (Stewart, J., concurring).[42] The case was remanded for the fashioning of appropriate relief. *Id.* at 569.

Lau reiterates the long-standing principle that was recently repeated by Justice Blackmun in *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 407 (1978): "[I]n order to treat some persons equally, we must treat them differently." See also *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971) (Burger, C.J.). The parallels between the present case and *Lau* are inescapable.

Camenisch is a deaf individual who needed the services of an interpreter to effectively participate in his graduate program. (Stip. ¶ 10, J.A. 31.) His barrier, like that of the students in *Lau*, was one of communication. Merely providing him with the same facilities, instruction, and curriculum would not allow him an equal educational opportunity. His inability to hear guaranteed that, without an interpreter, his "classroom experiences [would be] wholly incomprehensible and in no way meaningful." *Lau* v. *Nichols*, 414 U.S. at 566. That it was proper to require the University to rectify this dis-

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[42] The HEW regulations and interpretive guidelines held valid in *Lau* as within the authority of § 601, 414 U.S. at 571 (Stewart, J., concurring), are much the same as the HEW regulation at issue here. *Compare id.* at 567-68 *with* § 84.44. The guidelines upheld in *Lau* required school districts to "take affirmative steps to rectify the language deficiency in order to open its instructional program to" students whose "inability to speak and understand the English language excludes [them] . . . from effective participation in the educational program offered . . . ." 414 U.S. at 568; 35 Fed. Reg. 11595 (1970).

criminatory impact, accordingly, follows directly from *Lau*.[43]

In sum, the Court of Appeals correctly construed *Davis* in ruling for Camenisch. In fact, both *Davis* and this Court's earlier decision in *Lau* support Camenisch's claim and the validity of the § 84.44(d) auxiliary aid regulation as applied to the facts of this case.

D. The Requirement that the University Provide a Classroom Interpreter Cannot Depend on the Financial Status of the Qualified Handicapped Individual

The fact that Camenisch did not meet the University's established criteria for financial assistance to graduate students, even with the expenses of the interpreter added in (Stip. ¶ 9, J.A. 31),[44] is of no consequence to the analysis under *Davis* or *Lau*. As indicated by both its terms and legislative history, § 504 is a civil rights provision designed to protect qualified handicapped individuals from discrimination. The statute is, in all relevant respects, akin to § 601 of the Civil Rights Act of

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[43] In *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978), Justice Powell explained the difference between the affirmative steps required in *Lau* and affirmative action. The preference approved in *Lau* "did not result in the denial of the relevant benefit—'meaningful opportunity to participate in the educational program'—to anyone else," while affirmative action does just that. *Id.* at 304 (quoting *Lau* v. *Nichols*, 414 U.S. at 568). In addition, in *Lau* "[n]o other student was deprived by that preference of the ability to participate," and this generally is not the case in affirmative action situations. *Id.* See also *Lloyd* v. *Regional Transportation Auth.*, 548 F.2d 1277, 1284 (7th Cir. 1977).

For a thoughtful discussion of the distinction between "affirmative action" and the "affirmative steps" that federal recipients may, in certain situations, be required to take under § 504, see Note, 13 Creighton L. Rev. 607 (1979).

[44] Neither the financial aid criteria employed by the University, nor the kind of aid that would have been provided to Camenisch had he met the criteria, are part of the record.

1964 and Title IX of the Education Amendments of 1972, neither of which has a means test.[45]

Given the nature and purpose of § 504, whether the University must provide interpreters to remedy a discriminatory practice cannot depend on the financial status of the handicapped individual against whom that practice works. It is clear that all qualified handicapped individuals are to be equally protected under § 504—the statute makes no wealth classifications. Moreover, it would be unprecedented to require a person subjected to discrimination to bear the costs of eliminating that discrimination. For instance, it was not suggested in *Lau* that the Chinese students pay for the affirmative remedial efforts required there. Nor has it ever been suggested that minority students pay the costs of compliance with desegregation orders or that women participating in mandated athletic programs pay the costs of these programs.

Furthermore, requiring Camenisch to provide his own classroom interpreter would act as a surcharge on his participation in the graduate program. Whereas hearing students pay only tuition and incidental expenses, Camenisch would have to assume these costs *plus* those of an interpreter in order to receive the same educational opportunity.[46] This surcharge on access for a "qualified

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[45] For the text of Title VI, see note 41, *supra*. Title IX, 20 U.S.C. § 1681(a) (1976), provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education programs or activity receiving Federal financial assistance . . . ." As the Senate Conference Report on the 1974 Amendments to the Rehabilitation Act explained, "[s]ection 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964 . . . and section 901 of the Education Amendments of 1972 . . . ." S. Rep. No. 93-1270, 93d Cong. 2d Sess. 27 (1974).

[46] That other individuals are responsible for accommodating the costs of their own personalized needs (*e.g.*, eyeglasses, wheelchairs, etc.) is irrelevant to this "surcharge" argument. It is important to distinguish between general purpose aids like those noted parenthetically above, and educational access-specific aids like classroom interpreters, library readers, and the like. Only nonpayment for

handicapped individual" cannot square with the prohibitions contained in § 504.[47]

III. THE COURT OF APPEALS CORRECTLY HELD THAT § 504 OF THE REHABILITATION ACT OF 1973 CONFERS A PRIVATE RIGHT OF ACTION FOR INJUNCTIVE RELIEF

Whether § 504 confers a private right of action for injunctive relief need not be resolved in this case in light of *Maine* v. *Thiboutot*, No. 79-838, 48 U.S.L.W. 4859 (June 25, 1980). *Thiboutot* held that 42 U.S.C. § 1983 creates a cause of action for deprivations under color of state law of *any* federal statutory right. *Id.* at 4860-62. Here, Camenisch has stated a cause of action for injunctive relief against the state university officials under 42 U.S.C. § 1983, alleging a deprivation of § 504 rights.[48] See also *Quern* v. *Jordan*, 440 U.S. 332, 338 (1979); *Edelman* v. *Jordan*, 415 U.S. 651, 677 (1974).

In any event, the Court of Appeals correctly held that § 504 confers a private right of action for injunctive relief. (616 F.2d at 131-32; Pet. App. A-6 to A-8.) This holding is consistent with the conclusion reached by all Courts of Appeals that have decided the issue.[49]

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the latter constitute a surcharge because these aids relate specifically and quite limitedly to program access. As discussed at p. 17, *supra*, § 84.44(d) expressly disallows the provision of general purpose aids. Camenisch never requested that the University provide him with an interpreter for other than classroom purposes.

[47] The HEW letter of finding on Camenisch's administrative complaint determined that "[t]he financial status of a qualified handicapped student is not an acceptable criteria for determining whether auxiliary aids will be provided." (See p. 67a, *infra*.)

[48] The University of Texas is established by the State and administered under State law. See Texas Education Code Ann. tit. 3, §§ 65.01 *et seq.*, 66.01 *et seq.*, 67.01 *et seq.* (Vernon, 1972 & 1980-81 Supp.).

[49] *Kling* v. *Los Angeles County*, No. 80-5371 (9th Cir. Dec. 8, 1980); *NAACP* v. *Medical Center, Inc.*, 599 F.2d 1247 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158

Moreover, this Court held in *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), that Title IX of the Education Amendments of 1972 confers a private right of action. *Cannon* is especially applicable to the present case for at least two important reasons. First, § 504 "was patterned after, and is almost identical to . . . section 901 [Title IX] of the Education Amendments of 1972 . . . ." (See note 45, *supra*.) Second, the administrative procedures for enforcement under § 504 are identical to those used to enforce Title IX. See 45 C.F.R. §§ 84.61 & 84.71 (1979).

Even if *Cannon* is not viewed as dispositive, consideration of the factors identified in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), as relevant to determining whether a private remedy is to be implied shows that Congress intended § 504 to confer a private right of action in favor of qualified handicapped individuals.

First, § 504 was enacted for the benefit of qualified handicapped individuals, a class of which it has been stipulated that Camenisch is a member. (Stip. ¶ 8; J.A. 30.)

Second, the Rehabilitation Act and its legislative history show that Congress intended to create a private remedy under § 504. The Committee Report on the 1974 Amendments states that the

> "approach to implementation of Section 504, which closely follows [Title VI and Title IX] . . ., would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and *permit a judicial remedy through a private action.*"

(4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *United Handicapped Federation* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296 (2d Cir. 1977); *Lloyd* v. *Regional Transportation Auth.*, 548 F.2d 1277 (7th Cir. 1977).

S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974) (emphasis added). This intent is confirmed by the addition of an attorney's fee provision to Title V of the Act in the 1978 Amendments, § 505(b), 29 U.S.C. § 794a (b) (Supp. III, 1979), and the legislative history in support of that section.[50] Furthermore, in *Cannon*, the Court found persuasive evidence of legislative intent to provide a private remedy in "that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action . . . ." 441 U.S. at 703. Similarly, when Congress patterned § 504 after Title VI in 1973, it was aware of court decisions finding a private right of action under Title VI.[51]

Third, the implication of a private right of action under § 504 is consistent with the underlying purposes of the legislative scheme. As the Court of Appeals concluded, the remedy provided by HEW, see 45 C.F.R. § 84.61 (1979), is not intended to provide a forum for program beneficiaries like Camenisch to press claims of discrimination against grant recipients. (616 F.2d at

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[50] In its brief, the University points out that § 504 is not mentioned in the Civil Rights Attorney's Fees Awards Act of 1976, which amended 42 U.S.C. § 1988. (Pet. Br. at 15.) The University does not discuss the attorney's fee provision in the Rehabilitation Act itself. The legislative history of this attorney's fee provision leads to the inescapable conclusion that Congress assumed a private right of action existed under § 504. S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978); 124 Cong. Rec. S15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The Court in *Cannon* recognized the significance of a similar attorney's fee provision in ascertaining the legislative intent of Title IX. 441 U.S. at 685-86 n.6.

[51] Senate floor debate in 1978 on § 505(a)(2)—which applied VI rights and remedies to § 504 (see p. 22, *supra*)—reveals that Congress was keenly aware of judicial precedent on the private right of action issue. See 124 Cong. Rec. S15593 (daily ed. Sept. 20, 1978) (remarks of Sens. Bayh and Cranston).

135; Pet. App. A-16.) See *Cannon* v. *University of Chicago*, 441 U.S. at 706-08 n.41.[52]

Fourth, the cause of action is not one traditionally relegated to state law and in an area basically of concern to the state. The statute prohibits discrimination and applies to recipients of *federal* funds. See *id.* at 708-09.

Thus, all the *Cort* factors as applied to § 504 support the same result. Whether *Cannon* be viewed as dispositive or the factors in *Cort* be independently analyzed, § 504 creates a private right of action for injunctive relief for Camenisch to pursue against the University.

IV. RESPONDENT SUGGESTS THAT THE COURT OF APPEALS SHOULD HAVE DISMISSED THE APPEAL AS MOOT BECAUSE THE PRELIMINARY INJUNCTION WAS NO LONGER OPERATIVE

As a final matter, respondent believes that this case presents a jurisdictional question unrelated to the merits. The case has reached this Court after the University appealed pursuant to 28 U.S.C. § 1292(a)(1) from the grant of a preliminary injunction. That injunction required that the University "procure an interpreter or other effective method of making orally delivered course materials available to" Camenisch during the completion of his Master's degree at the University. (Pet. App. A-23.) As a condition of this relief, the District Court ordered Camenisch to post a $3,000 security bond. (*Id.* & J.A. 70.)

As ordered, the University provided Camenisch with an interpreter at its own expense (616 F.2d 127, 130; Pet. App. A-1), and he completed his degree requirements

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[52] For this same reason, added to the fact that the administrative process is extremely slow, it makes little sense to require exhaustion of administrative remedies prior to instituting a private action in federal court. See *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 706-08 n.41, 708 n.42 (discussing HEW's heavy backlog of administrative complaints).

in August 1978. (See note 5, *supra.*) Thus, the preliminary injunction no longer had any force or effect as of that time. Despite these facts, the Court of Appeals ruled that a justiciable issue remained for its consideration because "issues raised by an expired injunction are not moot if one party was required to post an injunction bond." (616 F.2d at 131; Pet. App. A-6.) Respondent suggests that this ruling is an erroneous application of mootness doctrine to an appeal from a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1).

The University was not obliged to pursue its appeal of the expired preliminary injunction in order to obtain repayment from Camenisch under the injunction bond. The prevailing rule is that liability on a preliminary injunction bond is not determined until a case has proceeded to a final judgment.[53] This rule is consistent with the policy considerations behind injunction bonds. The statutory requirement of security is rooted in the belief that the defendant deserves protection against a court order granted without the deliberation that accompanies a full trial. Conversely, if the plaintiff ultimately prevails on the merits, his obtaining of interlocutory relief did not unfairly damage the defendant. Accordingly, the protection offered by the injunction bond "consists of a promise that the defendant will be reimbursed for losses suffered if it turns out that the order issued was erroneous in the sense that it would not have been issued if there had been the opportunity for full deliberation."[54] Even if the issuance of a preliminary injunction is reversed on appeal, the defendant is required to await both final judg-

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[53] See Wright & Miller, 11 *Federal Practice and Procedure* § 2972 at 648 (1973); Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L. Rev. 333, 340 (1959); Note, *The Triggering of Liability on Injunction Bonds*, 52 N.C.L. Rev. 1252, 1265 (1974).

[54] *American Bible Society* v. *Blount*, 446 F.2d 588, 595 n.12 (3d Cir. 1971); Note, *supra*, 73 Harv. L. Rev. 333, 336 (1959).

ment and the completion of all subsequent appeals before recovering on the injunction bond.[55]

The law is clear that an interlocutory injunction order may become moot while the underlying controversy between the parties is not.[56] If a preliminary injunction order is moot—because, as here, the injunction has expired—then the purpose of an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(1) has been lost. That statute is an exception to the general federal policy "against piecemeal appeals," *Switzerland Cheese Association* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 24 (1966); its purpose is to permit litigants "to effectually challenge interlocutory orders of serious, perhaps irreparable consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955).

Accordingly, the reliance of the Court of Appeals on "the traditional rule that issues raised by an expired injunction are not moot if one party was required to post an injunction bond" (616 F.2d at 131; Pet. App. A-6), does not respond to the jurisdictional problem. Certainly,

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[55] Note, *supra*, 52 N.C.L. Rev. 1252, 1265 (1974). Thus the University appears to err in stating that the bond was posted "in order that the Petitioner might be reimbursed in the event that the order of the District Court was set aside on appeal." (Pet. Br. at 4.) The language of the bond (J.A. 70) does not reflect any intention to change the prevailing rule.

[56] *E.g.*, *Western Electric Co.* v. *Milgo Electronic Corp.*, 568 F.2d 1203, 1207-08 (5th Cir. 1978) (appeal from denial of injunctive relief mooted by administrative action requiring conduct sought by plaintiff; damage issue not moot); *Washington Metropolitan Area Transit Auth.* v. *Amalgamated Transit Union*, 531 F.2d 617 (D.C. Cir. 1976) (appeal from preliminary injunction against strike mooted by agreement ending labor dispute; appeal from contempt judgment not moot); *O'Brien* v. *Fackenthal*, 284 F. 850 (6th Cir. 1922) (appeal from temporary injunction mooted by cessation of strike; right to permanent injunction and damages, pending below, not moot). See also *Oil Workers Union* v. *Missouri*, 361 U.S. 363, 371 (1960) (appeal from final state-court injunction moot because injunction expired and separate proceeding below on penalties was pending).

if a court later determines that there was no right of action or that the complaint did not state a claim, then a defendant who has been preliminarily enjoined will prevail on the merits and become entitled to damages under the injunction bond. But an interlocutory appeal from a ruling denying dismissal of the complaint on such threshold issues—as in effect occurred here—can be taken only under 28 U.S.C. § 1292(b) or in connection with an appeal from a preliminary injunction order under 28 U.S.C. § 1292(a)(1).[57] When the preliminary injunction is moot, however, the underpinning of the § 1292(a)(1) appeal has been lost.[58]

This is not a situation in which the issues raised by the University are "capable of repetition, yet evading

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[57] On interlocutory appeal of an injunctive order, the scope of review often extends to threshold issues on the merits, such as failure to state a claim. See Wright, Miller, Cooper & Gressman, 16 *Federal Practice and Procedure* § 3921 at 16 *et seq.* (1977).

[58] The two cases relied on by the Court of Appeals for finding the appeal not moot are distinguishable. In *Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), a state-court *permanent* injunction against construction site picketing was affirmed by the state appellate court, although construction had been completed by the time it ruled. This Court ruled that the state court had no power to enter the injunction, because of federal labor law. It held that the appeal from the injunction was not moot, because petitioners (defendants below) would have had no recourse under the injunction bond unless the permanent injunction was reversed on the appeal, In short, unlike here, the underlying issues would never have been addressed.

In the other case relied on by the Court of Appeals, *Kinnett Dairies, Inc.* v. *Farrow*, 580 F.2d 1260, 1266 (5th Cir. 1978), the Court reviewed the grant of a preliminary injunction even though the injunction had been stayed pending appeal and the need for injunctive relief had passed. The Court's principal ground for reaching the merits, however, was that there was a "near certainty" that the act complained of would be repeated and thus result in further requests for injunctive relief. Although it observed that liability on the bond required in connection with the stay pending appeal remained to be adjudicated—so that the "case" was not moot—it did not state that this factor alone would have justified ruling on the appeal.

review." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *DeFunis* v. *Odegaard*, 416 U.S. 312, 319-20 (1974). The substantive isues are capable of repetition, but their review is ensured in this very case on the merits or on liability under the injunction bond, or in a subsequent action brought by a handicapped student who is more than a few months away from graduation or, finally, in a class action encompassing current and prospective handicapped students.

For all of these reasons, we suggest that the Court of Appeals erred in failing to dismiss the University's appeal as moot.

CONCLUSION

For the foregoing reasons, we request this Court to affirm the judgment below. If the Court finds the appeal to be moot, for the reasons in Part IV, *supra*, it should vacate the judgment of the Court of Appeals and remand with directions to dismiss as moot.

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Appendices

APPENDIX A

Sections 504 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 & 794a (Supp. III, 1979)

29 U.S.C. § 794:

Nondiscrimination under federal grants and programs; promulgation of rules and regulations

No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(Pub. L. 93-112, title V, § 504, Sept. 26, 1973, 87 Stat. 394, as amended Pub. L. 95-602, title I, §§ 119, 122(d)(2), Nov. 6, 1978, 92 Stat. 2982, 2987.)*

29 U.S.C. § 794a:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964

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* The 1978 amendment added the words after "Federal financial assistance" in the first sentence and added the second and third sentences.

(42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Pub. L. 93-112, title V, § 505, as added Pub. L. 95-602, title I, § 120, Nov. 6, 1978, 92 Stat. 2982.)

APPENDIX B

HEW Regulations, 45 C.F.R. pt. 84 (1979)

PART 84—NONDISCRMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE

Subpart A—General Provisions

Sec.
84.1 Purpose.
84.2 Application.
84.3 Definitions.
84.4 Discrimination prohibited.
84.5 Assurances required.
84.6 Remedial action, voluntary action, and self-evaluation.
84.7 Designation of responsible employee and adoption of grievance procedures.
84.8 Notice.
84.9 Administrative requirements for small recipients.
84.10 Effect of state or local law or other requirements and effect of employment opportunities.

Subpart B—Employment Practices

84.11 Discrimination prohibited.
84.12 Reasonable accommodation.
84.13 Employment criteria.
84.14 Preemployment inquiries.
84.15-84.20 [Reserved]

Subpart C—Program Accessibility

84.21 Discrimination prohibited.
84.22 Existing facilities.
84.23 New construction.
84.24-84.30 [Reserved]

Subpart D—Preschool, Elementary, and Secondary Education

Sec.
84.31 Application of this subpart.
84.32 Location and notification.
84.33 Free appropriate public education.
84.34 Educational setting.
84.35 Evaluation and placement.
84.36 Procedural safeguards.
84.37 Nonacademic services.
84.38 Preschool and adult education programs.
84.39 Private education programs.
84.40 [Reserved]

Subpart E—Postsecondary Education

84.41 Application of this subpart.
84.42 Admissions and recruitment.
84.43 Treatment of students; general.
84.44 Academic adjustments.
84.45 Housing.
84.46 Financial and employment assistance to students.
84.47 Nonacademic services.
84.48-84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

84.51 Application of this subpart.
84.52 Health, welfare, and other social services.
84.53 Drug and alcohol addicts.
84.54 Education of institutionalized persons.
84.55-84.60 [Reserved]

Subpart G—Procedures

84.61 Procedures.
84.62-84.99 [Reserved]

APPENDIX A—ANALYSIS OF FINAL REGULATION

APPENDIX B—GUIDELINES FOR ELIMINATING DISCRIMINATION AND DENIAL OF SERVICES ON THE BASIS OF RACE, COLOR, NATIONAL ORIGIN, SEX, AND HANDICAP IN VOCATIONAL EDUCATION PROGRAMS

AUTHORITY: Sec. 504, Rehabilitation Act of 1973, Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794); sec. 111(a), Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 606, Education of the Handicapped Act (20 U.S.C. 1405), as amended by Pub. L. 94-142, 89 Stat. 795; sec. 321, Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act of 1970, 84 Stat. 182 (42 U.S.C. 4581), as amended; sec. 407, Drug Abuse Office and Treatment Act of 1972, 86 Stat. 78 (21 U.S.C. 1174), as amended.

SOURCE: 42 FR 22677, May 4, 1977, unless otherwise noted.

Subpart A—General Provisions

§ 84.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 84.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Health, Education, and Welfare and to each program or activity that receives or benefits from such assistance.

§ 84.3 Definitions.

As used in this part, the term:

(a) "The Act" means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.

(b) "Section 504" means section 504 of the Act.

(c) "Education of the Handicapped Act" means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.

(d) "Department" means the Department of Health, Education, and Welfare.

(e) "Director" means the Director of the Office for Civil Rights of the Department.

(f) "Recipient" means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) "Applicant for assistance" means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) "Federal financial assistance" means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) "Facility" means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) "'Handicapped person." (1) "Handicapped persons" means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j) (1) of this section, the phrase:

(i) "Physical or mental impairment" means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) "Has a record of such an impairment" means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) "Is regarded as having an impairment" means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j) (2) (i) of this section but is treated by a recipient as having such an impairment.

(k) "Qualified handicapped person" means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under § 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(l) "Handicap" means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 84.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives or benefits from Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to any agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipients program;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different programs or activities provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such programs or activities that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving or benefiting from Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Programs limited by Federal law.* The exclusion of nonhandcipped persons from the benefits of a program limited by Federal statute or executive order to handi-

capped persons or the exclusion of a specific class of handicapped persons from a program limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 84.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance for a program or activity to which this part applies shall submit an assurance, on a form specified by the Director, that the program will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer shall contain a covenant running with the land to assure non-discrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is ex-

tended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b) (2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposed to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Director may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

§ 84.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Director finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Director deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exer-

cises control over the recipient that has discriminated, the Director, where appropriate, may require either or both recipients to take remedial action.

(3) The Director may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program but who were participants in the program when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c) (1) of this section, maintain on file, make available for public inspection, and provide to the Director upon request: (i) a list of the interested persons consulted (ii) a description of areas examined and any problems identified, and (iii) a description of any modifications made and of any remedial steps taken.

§ 84.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary education institutions.

§ 84.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applications, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification

shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its programs and activities. The notification shall also include an identification of the responsible employee designated pursuant to § 84.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 84.9 Administrative requirements for small recipients.

The Director may require any recipient with fewer than fifteen employees, or any class or such recipients, to comply with §§ 84.7 and 84.8, in whole or in part, when the Director finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 84.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of

qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B—Employment Practices

§ 84.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this subparagraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 84.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(b) Reasonable accommodation may include: (1) making facilities used by employees readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program, factors to be considered include:

(1) The overall size of the recipient's program with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 84.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless: (1) the test ascore or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and (2) alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when

administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 84.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept

confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided*, That: (1) All entering employees are subjected to such an examination regardless of handicap, and (2) the results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

§ 84.15—84.20 [Reserved]

Subpart C—Program Accessibility

§ 84.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be ex-

cluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 84.22 Existing facilities.

(a) *Program accessibility.* A recipient shall operate each program or activity to which this part applies so that the program or activity, when viewed in its entirety, is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternative accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of § 84.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a sig-

nificant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including

persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 84.23 New construction.

(a) *Design and construction.* Each facility or part of a facility construted by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accesible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *American National Standards Institute accessibility standards.* Design, construction, or alteration of facilities in conformance with the "American National Standard Specifications for Making Buildings and Facilities Accessible to, and Usable by, the Physically Handicapped," published by the American National Standards Institute, Inc. (ANSI A117.1-1961 (R1971)).[1] which is incorporated by reference in this part, shall constitute compliance with paragraphs (a) and (b) of this section. Departures from particular requirements of those standards by the use of other methods shall be permitted when it is clearly evident that equivalent access to the facility or part of the facility is thereby provided.

§§ 84.24—84.30 [Reserved]

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[1] Copies obtainable from American National Standards Institute, Inc., 1430 Broadway, New York, N.Y. 10018.

Subpart D—Preschool, Elementary, and Secondary Education

§ 84.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.32 Location and notification.

A recipient that operates a public elementary or secondary education program shall annually:

(a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and

(b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 84.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 84.34, 84.35, and 84.36.

(2) Implementation of an individualized education program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b) (1) (i) of this section.

(3) A recipient may place a handicapped person in or refer such person to a program other than the one that it operates as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education*—(1) *General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the program. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person in or refers such person to a program not operated by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the program is provided at no greater cost than would be incurred by the person or his or her parents or guardian if

the person were placed in the program operated by the recipient.

(3) *Residential placement.* If placement in a public or private residential program is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the program, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and § 84.34, a free appropriate public education to a handicapped person's and the parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made such a program available or otherwise regarding the question of financial responsibility are subject to the due process procedures of § 84.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 84.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in

the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 84.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 84.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in a regular or special education program and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with § 84.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 84.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 84.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of § 84.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 84.38 Preschool and adult education programs.

A recipient to which this subpart applies that operates a preschool education or day care program or activity or an adult education program or activity may not, on the basis of handicap, exclude qualified handicapped persons from the program or activity and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided under the program or activity.

§ 84.39 Private education programs.

(a) A recipient that operates a private elementary or secondary education program may not, on the basis of handicap, exclude a qualified handicapped person from such program if the person can, with minor adjustments, be provided an appropriate education, as defined in § 84.33 (b) (1), within the recipient's program.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that operates special education programs shall operate such programs in accordance with the provisions of §§ 84.35 and 84.36. Each recipient to which this section applies is subject to the provisions of §§ 84.34, 84.37, and 84.38.

§ 84.40 [Reserved]

Subpart E—Postsecondary Education

§ 84.41 Application of this subpart.

Subpart E applies to postsecondary education programs and activities, including postsecondary vocational education programs and activities, that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Director to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to § 84.6(a) or when a receip-

ient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to § 84.6 (b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided*, That:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b) (2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 84.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education program or activity to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education pro-

grams or activities not operated wholly by the recipient as part of, or equivalent to, and education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its programs and activities in the most integrated setting appropriate.

§ 84.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the program of instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement in its program, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under the education program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 84.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in

Subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 84.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not (i), on the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or (ii) assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner

that would not violate Subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates Subpart B.

§ 84.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of § 84.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

§§ 84.48—84.50 [Reserved]

Subpart F—Health, Welfare, and Social Services

§ 84.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities.

§ 84.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

(1) Deny a qualified handicapped person these benefits or services;

(2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;

(3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in § 84.4(b)) as the benefits or services provided to others;

(4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or

(5) Provide different or separate benefits or services to handicapped persons except where necessary to pro-

vide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Director may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 84.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 84.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in § 84.3(k)(2), in its program or activity is provided an appropriate education, as defined in § 84.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under Subpart D.

§§ 84.55—84.60 [Reserved]

Subpart G—Procedures

§ 84.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in §§ 80.6-80.10 and Part 81 of this Title.

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

§§ 84.62—84.99 [Reserved]

NOTE: Incorporation by reference provisions approved by the Director of the Federal Register, May 27, 1975. Incorporated documents are on file at the Office of the Federal Register.

[42 FR 22677, May 4, 1977; 42 FR 22888, May 5, 1977]

APPENDIX C

HEW Analysis, 45 C.F.R. pt. 84, App. A (1979)

APPENDIX A—ANALYSIS OF FINAL REGULATION

SUBPART A—GENERAL PROVISIONS

Definitions—1. *"Recipient"*. Section 84.23 contains definitions used throughout the regulation. Most of the comments concerning § 84.3(f), which contains the definition of "recipient," commended the inclusion of recipient whose sole source of Federal financial assistance is Medicaid. The Secretary believes that such Medicaid providers should be regarded as recipients under the statute and the regulation and should be held individually responsible for administering services in a nondiscriminatory fashion. Accordingly, § 84.3(f) has not been changed. Small Medicaid providers, however, are exempt from some of the regulation's administrative provisions (those that apply to recipients with fifteen or more employees). And such recipients will be permitted to refer patients to accessible facilities in certain limited circumstances under revised § 84.22(b). The Secretary recognizes the difficulties involved in federal enforcement of this regulation with respect to thousands of individual Medicaid providers. As in the case of title VI of the Civil Rights Act of 1964, the Office for Civil Rights will concentrate its compliance efforts on the state Medicaid agencies and will look primarily to them to ensure compliance by individual providers.

One other comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's

regulations implementing title VI and Title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of § 84.4(b)(iv), which prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

2. *"Federal financial assistance"*. In § 84.3(h), defining federal financial assistance, a clarifying change has been made: procurement contracts are specifically excluded. They are covered, however, by the Department of Labor's regulation under section 503. The Department has never considered such contracts to be contracts of assistance; the explicit exemption has been added only to avoid possible confusion.

The proposed regulation's exemption of contracts of insurance or guaranty has been retained. A number of comments argued for its deletion on the ground that section 504, unlike title VI and title IX, contains no statutory exemption for such contracts. There is no indication, however, in the legislative history of the Rehabilitation Act of 1973 or of the amendments to that Act in 1974, that Congress intended section 504 to have a broader application, in terms of federal financial assistance, than other civil rights statutes. Indeed, Congress directed that section 504 be implemented in the same manner as titles VI and IX. In view of the long established exemption of contracts of insurance or guaranty under title VI, we think it unlikely that Congress intended section 504 to apply to such contracts. In its May 1976 Notice of Intent, the Department suggested that the arrangement under which individual practitioners, hospitals, and other facilities receive reimbursement for providing services to beneficiaries under Part B of title XVIII of the

Social Security Act (Medicare) constitutes a contract of insurance or guaranty and thus falls within the exemption from the regulation. This explanation oversimplified the Department's view of whether Medicare Part B constitutes Federal financial assistance. The Department's position has consistenly been that, whether or not Medicare Part B arrangements involve a contract of insurance or guaranty, no Federal financial assistance flows from the Department to the doctor or other practitioner under the program, since Medicare Part B—like other social security programs—is basically a program of payments to direct beneficiaries.

3. *"Handicapped person"*. Section 84.3(j), which defines the class of persons protected under the regulation, has been substantially changed. The definition of handicapped person in paragraph (j)(1) conforms to the statutory definition of handicapped person that is applicable to section 504, as set forth in section 111(a) of the Rehabilitation Act Amendments of 1974, Pub. L. 93-516.

The first of the three parts of the statutory and regulatory definition includes any person who has a physical or mental impairment that substantially limits one or more major life activities. Paragraph (j)(2)(i) further defines physical or mental impairments. The definition does not set forth a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list. The term includes, however, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and, as discussed below, drug addiction and alcoholism.

It should be emphasized that a physical or mental impairment does not constitute a handicap for purposes of section 504 unless its severity is such that it re-

sults in a substantial limitation of one or more major life activities. Several comments observed the lack of any definition in the proposed regulation of the phrase "substantially limits." The Department does not believe that a definition of this term is possible at this time.

A related issue raised by several comments is whether the definition of handicapped person is unreasonably broad. Comments suggested narrowing the definition in various ways. The most common recommendation was that only "traditional" handicaps be covered. The Department continues to believe, however, that it has no flexibility within the statutory definition to limit the term to persons who have those severe, permanent, or progressive conditions that are most commonly regarded as handicaps. The Department intends, however, to give particular attention in its enforcement of section 504 to eliminating discrimination against persons with the severe handicaps that were the focus of concern in the Rehabilitation Act of 1973.

The definition of handicapped person also includes specific limitations on what persons are classified as handicapped under the regulation. The first of the three parts of the definition specifies that only physical and mental handicaps are included. Thus, environmental, cultural, and economic disadvantage are not in themselves covered; nor are prison records, age, or homosexuality. Of course, if a person who has any of these characteristics also has a physical or mental handicap, the person is included within the definition of handicapped person.

In paragraph (j)(2)(i), physical or mental impairment is defined to include, among other impairments, specific learning disabilities. The Department will interpret the term as it is used in section 602 of the Education of the Handicapped Act, as amended. Paragraph (15) of section 602 uses the term "specific learning dis-

abilities" to describe such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

Paragraph (j) (2) (i) has been shortened, but not substantively changed, by the deletion of clause (C), which made explicit the inclusion of any condition which is mental or physical but whose precise nature is not at present known. Clauses (A) and (B) clearly comprehend such conditions.

The second part of the statutory and regulatory definition of handicapped person includes any person who has a record of a physical or mental impairment that substantially limits a major life activity. Under the definition of "record" in paragraph (j) (2) (iii), persons who have a history of a handicapping condition but no longer have the condition, as well as persons who have been incorrectly classified as having such a condition, are protected from discrimination under section 504. Frequently occurring examples of the first group are persons with histories of mental or emotional illness, heart disease, or cancer; of the second group, persons who have been misclassified as mentally retarded.

The third part of the statutory and regulatory definition of handicapped person includes any person who is regarded as having a physical or mental impairment that substantially limits one or more major life activities. It includes many persons who are ordinarily considered to be handicapped but who do not technically fall within the first two parts of the statutory definition, such as persons with a limp. This part of the definition also includes some persons who might not ordinarily be considered handicapped, such as persons with disfiguring scars, as well as persons who have no physical or mental impairment but are treated by a recipient as if they were handicapped.

4. *Drug addicts and alcoholics.* As was the case during the first comment period, the issue of whether to include drug addicts and alcoholics within the definition of handicapped person was of major concern to many commenters. The arguments presented on each side of the issue were similar during the two comment periods, as was the preference of commenters for exclusion of this group of persons. While some comments reflected misconceptions about the implications of including alcoholics and drug addicts within the scope of the regulation, the Secretary understands the concerns that underlie the comments on this question and recognizes that application of section 504 to active alcoholics and drug addicts presents sensitive and difficult questions that must be taken into account in interpretation and enforcement.

The Secretary has carefully examined the issue and has obtained a legal opinion from the Attorney General. That opinion concludes that drug addiction and alcoholism are "physical or mental impairments" within the meaning of section 7(6) of the Rehabilitation Act of 1973, as amended, and that drug addicts and alcoholics are therefore handicapped for purposes of section 504 if their impairment substantially limits one of their major life activities. The Secretary therefore believes that he is without authority to exclude these conditions from the definition. There is a medical and legal consensus that alcoholism and drug addiction are diseases, although there is disagreement as to whether they are primarily mental or physical. In addition, while Congress did not focus specifically on the problems of drug addiction and alcoholism in enacting section 504, the committees that considered the Rehabilitation Act of 1973 were made aware of the Department's long-standing practice of treating addicts and alcoholics as handicapped individuals eligible for rehabilitation services under the Vocational Rehabilitation Act.

The Secretary wishes to reassure recipients that inclusion of addicts and alcoholics within the scope of the regulation will not lead to the consequences feared by many commenters. It cannot be emphasized too strongly that the statute and the regulation apply only to discrimination against qualified handicapped persons solely by reason of their handicap. The fact that drug addiction and alcoholism may be handicaps does not mean that these conditions must be ignored in determining whether an individual is qualified for services or employment opportunities. On the contrary, a recipient may hold a drug addict or alcoholic to the same standard of performance and behavior to which it holds others, even if any unsatisfactory performance or behavior is related to the person's drug addiction or alcoholism. In other words, while an alcoholic or drug addict may not be denied services or disqualified from employment solely because of his or her condition, the behavioral manifestations of the condition may be taken into account in determining whether he or she is qualified.

With respect to the employment of a drug addict or alcoholic, if it can be shown that the addiction or alcoholism prevents successful performance of the job, the person need not be provided the employment opportunity in question. For example, in making employment decisions, a recipient may judge addicts and alcoholics on the same basis it judges all other applicants and employees. Thus, a recipient may consider—for all applicants including drug addicts and alcoholics—past personnel records, absenteeism, disruptive, abusive, or dangerous behavior, violations of rules and unsatisfactory work performance. Moreover, employers may enforce rules prohibiting the possession or use of alcohol or drugs in the workplace, provided that such rules are enforced against all employees.

With respect to services, there is evidence that drug addicts and alcoholics are often denied treatment at hos-

pitals for conditions unrelated to their addiction or alcoholism. In addition, some addicts and alcoholics have been denied emergency treatment. These practices have been specifically prohibited by section 407 of the Drug Abuse Office and Treatment Act of 1972 (21 U.S.C. 1174) and section 321 of the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (42 U.S.C. 4581), as amended. These statutory provisions are also administered by the Department's Office of Civil Rights and are implemented in § 84.53 of this regulation.

With respect to other services, the implications of coverage, of alcoholics and drug addicts are two-fold: first, no person may be excluded from services solely by reason of the presence or history of these conditions; second, to the extent that the manifestations of the condition prevent the person from meeting the basic eligibility requirements of the program or cause substantial interference with the operation of the program, the condition may be taken into consideration. Thus, a college may not exclude an addict or alcoholic as a student, on the basis of addiction or alcoholism, if the person can successfully participate in the education program and complies with the rules of the college and if his or her behavior does not impede the performance of other students.

Of great concern to many commenters was the question of what effect the inclusion of drug addicts and alcoholics as handicapped persons would have on school disciplinary rules prohibiting the use or possession of drugs or alcohol by students. Neither such rules nor their application to drug addicts or alcoholics is prohibited by this regulation, provided that the rules are enforced evenly with respect to all students.

5. *"Qualified handicapped person."* Paragraph (k) of § 84.3 defines the term "qualified handicapped person."

Throughout the regulation, this term is used instead of the statutory term "otherwise qualified handicapped person." The Department believes that the omission of the word "otherwise" is necessary in order to comport with the intent of the statute because, read literally, "otherwise" qualified handicapped persons include persons who are qualified except for their handicap, rather than in spite of their handicap. Under such a literal reading, a blind person possessing all the qualifications for driving a bus except sight could be said to be "otherwise qualified" for the job of driving. Clearly, such a result was not intended by Congress. In all other respects, the terms "qualified" and "otherwise qualified" are intended to be interchangeable.

Section 84.3(k)(1) defines a qualified handicapped person with respect to employment as a handicapped person who can, with reasonable accommodation, perform the essential functions of the job in question. The term "essential functions" does not appear in the corresponding provision of the Department of Labor's section 503 regulation, and a few commenters objected to its inclusion on the ground that a handicapped person should be able to perform all job tasks. However, the Department believes that inclusion of the phrase is useful in emphasizing that handicapped persons should not be disqualified simply because they may have difficulty in performing tasks that bear only a marginal relationship to a particular job. Further, we are convinced that inclusion of the phrase is not inconsistent with the Department of Labor's application of its definition.

Certain commenters urged that the definition of qualified handicapped person be amended so as explicitly to place upon the employer the burden of showing that a particular mental or physical characteristic is essential. Because the same result is achieved by the requirement contained in paragraph (a) of § 84.13, which requires an

employer to establish that any selection criterion that tends to screen out handicapped persons is job-related, that recommendation has not been followed.

Section 84.3(k)(2) (formerly § 84.3(k)(3)) defines qualified handicapped person, with respect to preschool, elementary, and secondary programs, in terms of age. Several commenters recommended that eligibility for the services be based upon the standard of substantial benefit, rather than age, because of the need of many handicapped children for early or extended services if they are to have an equal opportunity to benefit from education programs. No change has been made in this provision, again because of the extreme difficulties in administration that would result from the choice of the former standard. Under the remedial action provisions of § 84.6(a)(3), however, persons beyond the age limits prescribed in § 84.3(k)(2) may in appropriate cases be required to be provided services that they were formerly denied because of a recipient's violation of section 504.

Section 84.3(k)(2) states that a handicapped person is qualified for preschool, elementary, or secondary services if the person is of an age at which nonhandicapped persons are eligible for such services or at which state law mandates the provision of educational services to handicapped persons. In addition, the extended age ranges for which recipients must provide full educational opportunity to all handicapped persons in order to be eligible for assistance under the Education of the Handicapped Act—generally, 3-18 as of September 1978, and 3-21 as of September 1980 are incorporated by reference in this paragraph.

Section 84.3(k)(3) formerly § 84.3(k)(2)) defines qualified handicapped person with respect to postsecondary educational programs. As revised, the paragraph means that both academic and technical standards must

be met by applicants to these programs. The term "technical standards" refers to all nonacademic admission criteria that are essential to participation in the program in question.

6. *General prohibitions against discrimination.* Section 84.4 contains general prohibitions against discrimination applicable to all recipients of assistance from this Department.

Paragraph (b) (1) (i) prohibits the exclusion of qualified handicapped persons from aids, benefits, or services, and paragraph (ii) requires that equal opportunity to participate or benefit be provided. Paragraph (iii) requires that services provided to handicapped persons be as effective as those provided to the nonhandicapped. In paragraph (iv), different or separate services are prohibited except when necessary to provide equally effective benefits.

In this context, the term "equally effective," defined in paragraph (b) (2), is intended to encompass the concept of equivalent, as opposed to identical, services and to acknowledge the fact that in order to meet the individual needs of handicapped persons to the same extent that the corresponding needs of nonhadicapped persons are met, adjustments to regular programs or the provision of different programs may sometimes be necessary. For example, a welfare office that uses the telephone for communicating with its clients must provide alternative modes of communicating with its deaf clients. This standard parallels the one established under title VI of Civil Rights Act of 1964 with respect to the provision of educational services to students whose primary language is not English. See *Lau* v. *Nichols*, 414 U.S. 563 (1974). To be equally effective, however, an aid, benefit, or service need not produce equal results; it merely must afford an equal opportunity to achieve equal results.

It must be emphasized that, although separate services must be required in some instances, the provision of unnecessarily separate or different services is discriminatory. The addition to paragraph (b) (2) of the phrase "in the most integrated setting appropriated to the person's needs" is intended to reinforce this general concept. A new paragraph (b) (3) has also been added to § 84.4, requiring recipients to give qualified handicapped persons the option of participating in regular programs despite the existence of permissibly separate or different programs. The requirement has been reiterated in §§ 84.38 and 84.47 in connection with physical education and athletics programs.

Section 84.4(b) (1) (v) prohibits a recipient from supporting another entity or person that subjects participants or employees in the recipient's program to discrimination on the basis of handicap. This section would, for example, prohibit financial support by a recipient to a community recreational group or to a professional or social organization that discriminates against handicapped persons. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient and the other entity, including financial support by the recipient, and whether the other entity's activities relate so closely to the recipient's program or activity that they fairly should be considered activities of the recipient itself. Paragraph (b) (1) (vi) was added in response to comment in order to make explicit the prohibition against denying qualified handicapped persons the opportunity to serve on planning and advisory boards responsible for guiding federally assisted programs or activities.

Several comments appeared to interpret § 84.4(b) (5), which proscribes discriminatory site selection, to prohibit a recipient that is located on hilly terrain from erecting any new buildings at its present site. That, of course, is

not the case. This paragraph is not intended to apply to construction of additional buildings at an existing site. Of course, any such facilities must be made accessible in accordance with the requirements of § 84.23.

7. *Assurances of compliance.* Section 84.5(a) requires a recipient to submit to the Director an assurance that each of its programs and activities receiving or benefiting from Federal financial assistance from this Department will be conducted in compliance with this regulation. To facilitate the submission of assurances by thousands of Medicaid providers, the Department will follow the title VI procedures of accepting, in lieu of assurances, certification on Medicaid vouchers. Many commenters also sought relief from the paperwork requirements imposed by the Department's enforcement of its various civil rights responsibilities by requesting the Department to issue one form incorporating title VI, title IX, and section 504 assurances. The Secretary is sympathetic to this request. While it is not feasible to adopt a single civil rights assurance form at this time, the Office for Civil Rights will work toward that goal.

8. *Private rights of action.* Several comments urged that the regulation incorporate provision granting beneficiaries a private right of action against recipients under section 504. To confer such a right is beyond the authority of the executive branch of Government. There is, however, case law holding that such a right exists. *Lloyd* v. *Regional Transportation Authority*, 548 F. 2d 1277 (7th Cir. 1977); *see Hairston* v. *Drosick*, Civil No. 75-0691 (S.D. W. Va., Jan. 14, 1976); *Gurmankin* v. *Castanzo*, 411 F.Supp. 982 (E.D. Pa. 1976); *cf. Lau* v. *Nichols*, *supra*.

9. *Remedial action.* Where there has been a finding of discrimination, § 84.6 requires a recipient to take remedial action to overcome the effects of the discrimination. Actions that might be required under paragraph (a)(1)

include provision of services to persons previously discriminated against, reinstatement of employees and development of a remedial action plan. Should a recipient fail to take required remedial action, the ultimate sanctions of court action or termination of Federal financial assistance may be imposed.

Paragraph (a)(2) extends the responsibility for taking remedial action to a recipient that exercises control over a noncomplying recipient. Paragraph (a)(3) also makes clear that handicapped persons who are not in the program at the time that remedial action is required to be taken may also be the subject of such remedial action. This paragraph has been revised in response to comments in order to include persons who would have been in the program if discriminatory practices had not existed. Paragraphs (a)(1), (2), and (3) have also been amended in response to comments to make plain that, in appropriate cases, remedial action might be required to redress clear violations of the statute itself that occurred before the effective date of this regulation.

10. *Voluntary action.* In § 84.6(b), the term "voluntary action" has been substituted for the term "affirmative action" because the use of the latter term led to some confusion. We believe the term "voluntary action" more accurately reflects the purpose of the paragraph. This provision allows action, beyond that required by the regulation, to overcome conditions that led to limited participation by handicapped persons, whether or not the limited participation was caused by any discriminatory actions on the part of the recipient. Several commenters urged that paragraphs (a) and (b) be revised to require remedial action to overcome effects of prior discriminatory practices regardless of whether there has been an express finding of discrimination. The self-evaluation requirement in paragraph (c) accomplishes much the same purpose.

11. *Self-evaluation.* Paragraph (c) requires recipients to conduct a self-evaluation in order to determine whether their policies or practices may discriminate against handicapped persons and to take steps to modify any discriminatory policies and practices and their effects. The Department received many comments approving of the addition to paragraph (c) of a requirement that recipients seek the assistance of handicapped persons in the self-evaluation process. This paragraph has been further amended to require consultation with handicapped persons or organizations representing them before recipients undertake the policy modifications and remedial steps prescribed in paragraphs (c) (ii) and (iii).

Paragraphs (c) (2), which sets forth the recordkeeping requirements concerning self-evaluation, now applies only to recipients with fifteen or more employees. This change was made as part of an effort to reduce unnecessary or counterproductive administrative obligations on small recipients. For those recipients required to keep records, the requirements have been made more specific; records must include a list of persons consulted and a description of areas examined, problems identified, and corrective steps taken. Moreover, the records must be made available for public inspection.

12. *Grievance procedure.* Section 84.7 (formerly § 84.8) requires recipients with fifteen or more employees to designate an individual responsible for coordinating its compliance efforts and to adopt a grievance procedure. Two changes were made in the section in response to comment. A general requirement that appropriate due process procedures be followed has been added. It was decided that the details of such procedures could not at this time be specified because of the varied nature of the persons and entities who must establish the procedures and of the programs to which they apply. A sentence was also added to make clear that grievance procedures

are not required to be made available to unsuccessful applicants for employment or to applicants for admission to colleges and universities.

The regulation does not require that grievance procedures be exhausted before recourse is sought from the Department. However, the Secretary believes that it is desirable and efficient in many cases for complainants to seek resolution of their complaints and disputes at the local level and therefore encourages them to use available grievance procedures.

A number of comments asked whether compliance with this section or the notice requirements of § 84.8 could be coordinatd with comparable action required by the title IX regulation. The Department encourages such efforts.

13. *Notice.* Section 84.8 (formerly § 84.9) sets forth requirements for dissemination of statements of nondiscrimination policy by recipients.

It is important that both handicapped persons and the public at large be aware of the obligations of recipients under section 504. Both the Department and recipients have responsibilities in this regard. Indeed the Department intends to undertake a major public information effort to inform persons of their rights under section 504 and this regulation. In § 84.8 the Department has sought to impose a clear obligation on major recipients to notify beneficiaries and employees of the requirements of section 504, without dictating the precise way in which this notice must be given. At the same time, we have avoided imposing requirements on small recipients (those with fewer than fifteen employees) that would create unnecessary and counterproductive paper work burdens on them and unduly stretch the enforcement resources of the Department.

Section 84.8(a), as simplified, requires recipients with fifteen or more employees to take appropriate steps to notify beneficiaries and employees of the recipient's obligations under section 504. The last sentence of § 84.8(a) has been revised to list possible, rather than required, means of notification. Section 84.8(b) requires recipients to include a notification of their policy of nondiscrimination in recruitment and other general information materials.

In response to a number of comments, §84.8 has been revised to delete the requirements of publication in local newspapers, which has proved to be both troublesome and ineffective. Several commenters suggested that notification on separate forms be allowed until present stocks of publications and forms are depleted. The final regulation explicitly allows this method of compliance. The separate form should, however, be included with each significant publication or form that is distributed.

Former § 84.9(b)(2), which prohibited the use of materials that might give the impression that a recipient excludes qualified handicapped persons from its program, has been deleted. The Department is convinced by the comments that this provision is unnecessary and difficult to apply. The Department encourages recipients, however, to include in their recruitment and other general information materials photographs of handicaped persons and ramps and other features of accessible buildings.

Under new § 84.9 the Director may, under certain circumstances, require recipients with fewer than fifteen employees to comply with one or more of these requirements. Thus, if experience shows a need for imposing notice or other requirements on particular recipients or classes of small recipients, the Department is prepared to expand the coverage of these sections.

14. *Inconsistent State laws.* Section 84.10(a) states that compliance with the regulation is not excused by

state or local laws limiting the eligibility of qualified handicapped persons to receive services or to practice an occupation. The provision thus applies only with respect to state or local laws that unjustifiably differentiate on the basis of handicap.

Paragraph (b) further points out that the presence of limited employment opportunities in a particular profession, does not excuse a recipient from complying with the regulation. Thus, a law school could not deny admission to a blind applicant because blind lawyers may find it more difficult to find jobs than do nonhandicapped lawyers.

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SUBPART E—POSTSECONDARY EDUCATION

Subpart E prescribes requirements for nondiscrimination in recruitment, admission, and treatment of students in postsecondary education programs and activities, including vocational education.

29. *Admission and recruitment.* In addition to a general prohibition of discrimination on the basis of handicap in § 84.42(b), specific prohibitions concerning the establishment of limitations on admission of handicappped students, the use of tests or selection criteria, and preadmission inquiry. Several changes have been made in this provision.

Section 84.42(b) provides that postsecondary educational institutions may not use any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons unless it has been validated as a predictor of academic success and alternate tests or criteria with a less disproportionate, adverse effect are shown by the Department to be available. There are two significant changes in this approach from the July 16 proposed regulation.

First, many commenters expressed concern that § 84-42(b)(2)(ii) could be interpreted to require a "global search" for alternate tests that do not have a disproportionate, adverse impact on handicapped persons, this was not the intent of the provision and, therefore, it has been amended to place the burden on the Director of the Office for Civil Rights, rather than on the recipient to identify alternate tests.

Second, a new paragraph (d), concerning validity studies, has been added. Under the proposed regulation, overall success in an education program, not just first year grades, was the criterion against which admissions tests were to be validated. This approach has been changed to reflect the comment of professional testing services that use of first year grades would be less disruptive of present practice and that periodic validity studies against overall success in the education program, would be sufficient check on the reliability of first-year grades.

Section 84.42(b)(3) also requires a recipient to assure itself that admissions tests are selected and administered to applicants with impaired sensory, manual, or speaking skills in such manner as is necessary to avoid unfair distortion of test results. Methods have been developed for testing the aptitude and achievement of persons who are not able to take written tests or even to make the marks required for mechanically scored objective tests; in addition, methods for testing persons with visual or hearing impairments are available. A recipient, under this paragraph, must assure itself that such methods are used with respect to the selection and administration of any admissions tests that it uses.

Section 84.42(b)(3)(iii) has been amended to require that admissions tests be administered in facilities that, on the whole, are accessible. In this context, "on the whole" means that not all of the facilities need be ac-

cessible so long as a sufficient number of facilities are available to handicapped persons.

Revised § 84.42(b)(4) generally prohibits preadmission inquiries as to whether an applicant has a handicap. The considerations that led to this revision are similar to those underlying the comparable revision of § 84.14 on preemployment inquiries. The regulation does, however, allow inquiries to be made, after admission but before enrollment, as to handicaps that may require accommodation.

New paragraph (c) parallels the section on preemployment inquiries and allows postsecondary institutions to inquire about applicants' handicaps before admission, subject to certain safeguards, if the purpose of the inquiry is to take remedial action to correct past discrimination or to take voluntary action to overcome the limited participation of handicapped persons in postsecondary educational institutions.

Proposed § 84.42(c), which would have allowed different admissions criteria in certain cases for handicapped persons, was widely misinterpreted in comments from both handicapped persons and recipients. We have concluded that the section is unnecessary and it has been deleted.

30. *Treatment of students.* Section 84.43 contains general provisions prohibiting the discriminatory treatment of qualified handicapped applicants. Paragraph (b) requires recipients to ensure that equal opportunities are provided to its handicapped students in education programs and activities that are not operated by the recipient. The recipient must be satisfied that the outside education program or activity as a whole is nondiscriminatory. For example, a college must ensure that discrimination on the basis of handicap does not occur in connection with teaching assignments of student teachers

in elementary or secondary schools not operated by the college. Under the "as a whole" wording, the college could continue to use elementary or secondary school systems that discriminate if, and only if, the college's student teaching program, when viewed in its entirety, offered handicapped student teachers the same range and quality of choice in student teaching assignments afforded nonhandicapped students.

Paragraph (c) of this section prohibits a recipient from excluding qualified handicapped students from any course, course of study, or other part of its education program or activity. This paragraph is designed to eliminate the practice of excluding handicapped persons from specific courses and from areas of concentration because of factors such as ambulatory difficulties of the student or assumptioins by the recipient that no job would be available in the area in question for a person with that handicap.

New paragraph (d) requires postsecondary institutions to operate their programs and activities so that handicapped students are provided services in the most integrated setting appropriate. Thus, if a college had several elementary physics classes and had moved one such class to the first floor of the science building to accommodate students in wheelchairs, it would be a violation of this paragraph for the college to concentrate handicapped students with no mobility impairments in the same class.

31. *Academic adjustments.* Paragraph (a) of § 84.44 requires that a recipient make certain adjustments to academic requirements and practices that discriminate or have the effect of discriminating on the basis of handicap. This requirement, like its predecessor in the proposed regulation, does not obligate an institution to waive course or other academic requirements. But such institutions must accommodate those requirements to the

needs of individual handicapped students. For example, an institution might permit an otherwise qualified handicapped student who is deaf to substitute an art appreciation or music history course for a required course in music appreciation or could modify the manner in which the music appreciation course is conducted for the deaf student. It should be stressed that academic requirements that can be demonstrated by the recipient to be essential to its program of instruction or to particular degrees need not be changed.

Paragraph (b) provides that postsecondary institutions may not impose rules that have the effect of limiting the participation of handicapped students in the education program. Such rules include prohibition of tape recorders or braillers in classrooms and dog guides in campus buildings. Several recipients expressed concern about allowing students to tape record lectures because the professor may later want to copyright the lectures. This problem may be solved by requiring students to sign agreements that they will not release the tape recording or transcription or otherwise hinder the professor's ability to obtain a copyright.

Paragraph (c) of this section, concerning the administration of course examinations to students with impaired sensory, manual, or speaking skills, parallels the regulation's provisions on admissions testing (§ 84.42 (b)) and will be similarly interpreted.

Under § 84.44(d), a recipient must ensure that no handicapped student is subject to discrimination in the recipient's program because of the absence of necessary auxiliary educational aids. Colleges and universities expressed concern about the costs of compliance with this provision.

The Department emphasizes that recipients can usually meet this obligation by assisting students in using exist-

ing resources for auxiliary aids such as state vocational rehabilitation agencies and private charitable organizations. Indeed, the Department anticipates that the bulk of auxiliary aids will be paid for by state and private agencies, not by colleges or universities. In those circumstances where the recipient institution must provide the educational auxiliary aid, the institution has flexibility in choosing the methods by which the aids will be supplied. For example, some universities have used students to work with the institution's handicapped students. Other institutions have used existing private agencies that tape texts for handicapped students free of charge in order to reduce the number of readers needed for visually impaired students.

As long as no handicapped person is excluded from a program because of the lack of an appropriate aid, the recipient need not have all such aids on hand at all times. Thus, readers need not be available in the recipient's library at all times so long as the schedule of times when a reader is available is established, is adhered to, and is sufficient. Of course, recipients are not required to maintain a complete braille library.

32. *Housing.* Section 84.45(a) requires postsecondary institutions to provide housing to handicapped students at the same cost as they provide it to other students and in a convenient, accessible, and comparable manner. Commenters, particularly blind persons pointed out that some handicapped persons can live in any college housing and need not wait to the end of the transition period in Subpart C to be offered the same variety and scope of housing accommodations given to nonhandicapped persons. The Department concurs with this position and will interpret this section accordingly.

A number of colleges and universities reacted negatively to paragraph (b) of this section. It provides that, if a recipient assists in making off-campus housing avail-

able to its students, it should develop and implement procedures to assure itself that off-campus housing, as a whole, is available to handicapped students. Since postsecondary institutions are presently required to assure themselves that off-campus housing is provided in a manner that does not discriminate on the basis of sex (§ 86.32 of the title IX regulation), they may use the procedures developed under title IX in order to comply with § 84.45(b). It should be emphasized that not every off-campus living accommodation need be made accessible to handicapped persons.

33. *Health and insurance.* Section 84.46 of the proposed regulation, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of section 84.43. This deletion represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them.

34. *Financial assistance.* Section 84.46(a) (formerly § 84.47), prohibiting discrimination in providing financial assistance, remains substantively the same. It provides that recipients may not provide less assistance to or limit the eligibility of qualified handicapped persons for such asistance, whether the assistance is provided directly by the recipient or by another entity through the recipient's sponsorship. Awards that are made under will, trusts, or similar legal instruments in a discriminatory manner are permisisble, but only if the overall effect of the recip-

ient's provision of financial assistance is not discriminatory on the basis of handicap.

It will not be considered discriminatory to deny, on the basis of handicap, an athletic scholarship to a handicapped person if the handicap renders the person unable to qualify for the award. For example, a student who has a neurological disorder might be denied a varsity football scholarship on the basis of his inability to play football, but a deaf person could not, on the basis of handicap, be denied a scholarship for the school's diving team. The deaf person could, however, be denied a scholarship on the basis of comparative diving ability.

Commenters on § 84.46(b), which applies to assistance in obtaining outside employment for students, expressed similar concerns to those raised under § 84.43(b), concerning cooperative programs. This paragraph has been changed in the same manner as § 84.43(b) to include the "as a whole" concept and will be interpreted in the same manner as § 84.43(b).

35. *Nonacademic services.* Section 84.47 (formerly § 84.48) establishes nondiscrimination standards for physical education and athletics counseling and placement services, and social organizations. This section sets the same standards as does § 84.38 of Subpart D, discussed above, and will be interpreted in a similar fashion.

* * * * *

SUBPART G—PROCEDURES

In § 84.61, the Secretary has adopted the title VI complaint and enforcement procedures for use in implementing section 504 until such time as they are superseded by the issuance of a consolidated procedural regulation applicable to all of the civil rights statutes and executive orders administered by the Department.

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[42 FR 22677, May 4, 1977, as amended at 44 FR 17168, Mar. 21, 1979]

APPENDIX D

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

REGIONAL OFFICE
1200 Main Tower Building
Dallas, Texas 75202

Office for Civil Rights

Ref. #780041
#792062

January 24, 1980

Mr. Marc P. Charmatz
Litigation Attorney
The National Association of the Deaf
Legal Defense Fund
P.O. Box 1793
7th Street & Florida Avenue, N.E.
Washington, D.C. 20002

Subject: *Camenisch* vs. *University of Texas at Austin*

Dear Mr. Charmatz:

The investigation of the allegations against the University of Texas at Austin (UTA) raised by Mr. Walter Camenisch has been completed. Our findings are directed to you since Mr. Camenisch has designated you as his legal representative.

An on-site investigation was conducted by Dr. Marta Olchyk on March 19-21, 1979. Based on the results of that investigation, we have concluded that UTA is in violation of Section 504 of the Rehabilitation Act of 1973 by failing to provide educational auxiliary aids to students with

impaired sensory skills, thus denying handicapped students equal educational opportunities.

Our investigation revealed that Mr. Camenisch is a qualified handicapped individual as defined by the implementing regulation of Section 504 of the Rehabilitation Act of 1973. Mr. Camenisch, as well as other deaf graduate students, requested that UTA provide funds for the payment of a qualified interpreter for the purpose of assuring them full participation in classes at that institution. We have determined that the requested interpreter services were necessary for Mr. Camenisch to fully participate in the educational porgram in which he was enrolled. Mr. Camenisch was denied such services verbally and in writing by the UTA administrators. The basis cited for the denial was the University's financial needs criteria.

45 CFR, Section 84.44(d) of the Regulations implementing Section 504 of the Rehabilitation Act of 1973 provides:

> Auxiliary Aids: (1) A recipient to which this subpart applies shall take such steps as necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in or otherwise subjected to discrimination under any educational program or activity operated by the recipient because of the absence of educational auxiliary aids for students with impaired sensory, manual or speaking skills.

Therefore, use of a financial needs criteria in determining whether the necessary aids will be provided to a sensory impaired handicapped student is in violation of the above quoted paragraph. The financial status of a qualified handicapped student is not an acceptable criteria for determining whether necessary auxiliary aids will be provided.

Based on the above, our office requested that UTA develop and submit to us a specific plan which will correct this violation within 15 working days of the date of this letter.

A copy of the letter of finding sent to UTA will be made available to you upon request.

We would like to thank you and Mr. Camenisch for the cooperation provided to us while conducting this investigation. You will be informed of the status of the case.

Sincerely,

/s/ Taylor D. August
TAYLOR D. AUGUST
Director, Region VI

cc: Walter Camenisch